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No. _____

In The

Supreme Court of the United States

HUGH HARDAGE,

Petitioner,

v.

CBS BROADCASTING, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer establishes the *Faragher/Ellerth* affirmative defense, as a matter of law, when an employee complains of sexual harassment by a manager to both Human Resources and his supervisor, and the employer does not investigate the complaint or take any other remedial action to prevent and correct the harassment because the employee accepts the employer's suggestion that the employer do nothing and the employee handle it on his own.

PARTIES TO THE PROCEEDINGS

The Petitioner, who was the Plaintiff below, is Hugh Hardage.

Respondents, who were Defendants below, are CBS Broadcasting, Inc., Viacom Television Stations, Inc., and Viacom Broadcasting of Seattle, Inc.

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OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit are reported at 427 F.3d 1177 (9th Cir. November 1, 2005). App. 1-38. The order denying panel rehearing and amending the majority opinion is reported at 433 F.3d 672 (9th Cir. January 6, 2006). App. 70-71. The order denying en banc review and amending the majority opinion is reported at 436 F.3d 1050 (9th Cir. February 8, 2006). App. 72-73. The order granting summary judgment in favor of the respondents was entered on October 22, 2003, and is unpublished. App. 39-67.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331, 28 U.S.C. § 1343(4), 42 U.S.C. § 1983, and 42 U.S.C. § 1988. The jurisdiction of the Ninth Circuit Court of Appeals was invoked under 28 U.S.C. § 1291 and Fed. R. App. P. 4(a). On November 1, 2005, a panel of the Ninth Circuit issued its opinion. App. 1. On January 6, 2006, the Ninth Circuit panel denied Petitioner's petition for panel rehearing. App.70. On February 8, 2006, the Ninth Circuit entered an order denying rehearing en banc. App. 72.

This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1254(1) and Rule 10(a) and (c) of the Rules of the Supreme Court of the United States. The Petition is timely pursuant to 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of the Supreme Court of the United States

because it is filed within 90 days of the denial of the Petition for Rehearing En Banc by the Ninth Circuit.

STATUTORY PROVISION INVOLVED

The statute involved is 42 U.S.C. § 2000(e), *et seq.* ("Title VII"). App. 75-84.

STATEMENT OF THE CASE

Factual Summary

Hugh Hardage, Petitioner, worked as an advertising account executive for a television station owned by the Respondents (collectively "CBS"). App. 2. In February of 2000, Kathy Sparks, the station's General Manager, and Patty Dean, the station's General Sales Manager, promoted Hardage to Local Sales Manager. App. 2. Dean was Hardage's direct supervisor. App. 2. Sparks oversaw Dean and all of the employees of the station, including Hardage. App. 2.

Shortly after his promotion, Sparks began subjecting Hardage to ongoing and increasingly severe sexual harassment. App. 2-5. The harassment consisted of ongoing and continuous unwanted sexual advances in the office, the seriousness of which was heightened by several instances of unwanted sexual touching by Sparks. App. 3-5. On Easter Sunday in 2000, Sparks put her arms around Hardage's waist and told him that he had a "cute ass." App. 3. Later that day, Sparks slid her foot under a restaurant table and put it in Hardage's crotch. App. 4. When

Hardage denied her advances, Sparks became "livid." App. 4.

Two days later, Sparks told Hardage that she was having orgasms in her sleep and asked if he felt the same way about her. App. 4. Hardage insisted that he did not want to damage his career by having a relationship, to which Sparks replied, "Don't forget who got you to where you are." App. 4. Sparks continued to pursue Hardage when she had contact with him in the office. App. 3. In August of 2000 she arranged her travel plans so she would sit next to Hardage on a flight to Texas to visit their respective families. App. 4. On the flight, Sparks took off her shoe and rubbed Hardage's leg. App. 4. When Hardage asked her to stop, she began rubbing his back. App. 4. When talking to others on the flight, Sparks referred to Hardage as her boyfriend. App. 4. She offered Hardage oral sex and told him that one experience of sexual intercourse with her would be life-altering for him. App. 4-5. Hardage insisted that nothing physical would happen between them. App. 5.

In October of 2000, Hardage and Sparks took clients to a baseball game. App. 5. During the game, Sparks rubbed Hardage's leg with her foot. App. 5. Again, Hardage rebuked the advances, but Sparks later took off her rain poncho, put it over Hardage's lap and reached under it for Hardage's crotch. App. 5. Hardage elbowed her hand away and told her to stop. App. 5. After the game, Sparks became jealous when Hardage was talking with other women and shouted, "Who haven't you f – – ed in here?" and then told Hardage, "Don't f – – ing talk to me. You're finished." App. 5.

The next day, Hardage told Dean that he wanted to file a formal complaint against Sparks because Sparks "went way too far." App. 5. Hardage did not tell Dean specifics about the sexual contact by Sparks because he was extremely nervous and intimidated by the events that had transpired and it was "a scary place to be." App. 88. Dean never asked about the specifics of the harassment. App. 30. However, even without knowing the details, Dean understood that he was complaining about sexual harassment. App. 29.

Hardage had previously complained to Dean about Sparks' harassing conduct on several occasions, but Sparks' sexual advances were a running joke with Dean. App. 88. For example, Dean tried to set Hardage and Sparks up in situations where they would be together even though Hardage repeatedly asked not to be left alone with Sparks and declined to attend functions with Sparks because he wanted no part of being around her. App. 88, 93. Yet, Dean would say things like, "Why don't you just do it and get it over with. It may put her in a better mood" and "if you do it, I don't want to know; I just don't want to know; don't tell me." App. 6, 88.

Dean contacted Ray Rajewski, an executive vice president, who in turn called Hardage to let him know that he would be contacted by Paul Falcone, who Hardage understood was CBS's in house counsel. App. 6, 91. Falcone was not actually an attorney but instead a human resources representative. App. 91. Hardage did not learn that Falcone was not an attorney until his deposition for this case. App. 91. Hardage believed that Falcone was an attorney because he knew that Falcone wrote several books about sexual harassment. App. 92.

The next week, Hardage drove Falcone to the airport and they talked for 15 to 20 minutes. App. 6, 94. During that drive, Hardage was "nervous as hell," because he was in "unchartered waters" talking to a corporate attorney who he had no relationship with. App. 91. Without going into the "gory details," Hardage told Falcone that Sparks had made unwanted sexual advances that he rejected, that he was uncomfortable with the situation, that Sparks' behavior was affecting his working relationship with employees who reported to him, that it was completely out of line and over the top, and that he felt it was going to be very difficult to recover from the instance of harassment at and after the Mariners game. App. 6, 92.

Falcone did not ask Hardage about the details of the sexual harassment. App. 30.

Hardage was aware of CBS's policy against sexual harassment. App. 18. However, he was concerned about retaliation and backlash from making a complaint, so he asked Falcone what his options were for remedying the situation. App. 28. Falcone testified that he gave Hardage the following three choices for dealing with the harassment: (1) "do absolutely nothing and hope it solves itself," (2) Hardage could talk to Sparks on his own, or (3) Falcone could "very nicely talk with" Sparks and ask her to "just lay back on this a little bit," but he assured Hardage that he would not "yell at her and get her in trouble." App. 28. All three options were inconsistent with CBS's written policy against sexual harassment, which required a "thorough investigation" and questioning of witnesses. App. 14, 32.

After Falcone presented these three options to Hardage during the drive to the airport, Hardage told Falcone

that he would handle the situation on his own. App. 29. Falcone then recommended to Rajewski that "it didn't even need to be brought to Kathy Sparks' attention." App. 25. CBS accepted Falcone's recommendation and never told Sparks' about the complaint of harassment or that her conduct was inappropriate. App. 25.

Falcone testified that he called Hardage two weeks after the drive to the airport and Hardage told him that nothing new had happened and that he still wanted to handle it on his own.[1] App. 6-7. Hardage did not remember that conversation at all. App. 89. Rather, Hardage remembered calling and leaving messages for Falcone on his answering machine that were not returned, and then calling back and being told that Falcone was no longer with the company. App. 89-90.

After the meeting with Falcone, the harassment continued. In March of 2001, Dean set Hardage up to take Sparks and Sparks' mother to dinner. App. 86, 93. While Hardage insisted that he did not want to go because he was scared something would happen, Dean insisted that he take her to dinner. App. 93. This was part of Dean's running joke to put Hardage in date-like situations with Sparks. App. 88, 93. At the dinner, Sparks rubbed Hardage's chest and back, and then turned to him and said,

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[1] Petitioner anticipates that CBS will, as it has throughout this case, respond by citing incomplete testimony and construing disputed facts in the light most favorable to itself. App. 27-38 (Judge Paez describing material disputed facts that the majority opinion overlooks). However, CBS's version of the facts is not at issue before this Court, because on review of a motion for summary judgment, the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's [Petitioner's] favor. *Hunt v. Cromartie*, 526 U.S. 541, 552, 143 L. Ed. 2d 731, 119 S. Ct. 154 (1999).

"Oops, sexual harassment." App. 49, 85. She later proceeded to rub Hardage's leg under the table. App. 49. Hardage told her about the complaint that he filed against her for sexual harassment. App. 86-87. She turned to Hardage and said, "I f – – ing knew I had to fear you, motherf – – er." App. 87.

Procedural History

On June 19, 2002, Hardage filed claims in the United States District Court, Western District of Washington, for, inter alia, sexual harassment in violation of Title VII of the Civil Rights Act. On October 22, 2003, the District Court granted CBS's motion for summary judgment dismissing Hardage's claim for sexual harassment on the basis that CBS was protected from vicarious liability by the affirmative defense established by this Court in *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998) ("*Faragher/Ellerth* affirmative defense"). App. 64. Hardage's separate state and federal claims for retaliation and constructive discharge were also dismissed. App. 65. While Hardage appealed the dismissal of those claims to the Ninth Circuit Court of Appeals, he does not seek review of those claims in this Petition.

Hardage appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. On November 1, 2005, Judges Clifford Wallace and Barry G. Silverman issued a majority opinion affirming the dismissal of Hardage's claims. App. 1. Judge Richard A. Paez issued a dissenting opinion regarding the dismissal of Hardage's sexual harassment claim. App. 22.

This Court established the *Faragher/Ellerth* affirmative defense to protect employers from vicarious liability for sexual harassment by its supervisors when no tangible employment action occurred and the employer proves by a preponderance of the evidence *both* of the following two necessary elements:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

The Ninth Circuit found that "an employer's response to a harassment complaint may be deemed reasonable *as a matter of law* even though the employer conducted *no investigation* and took *no action* to address the harassing behavior." App. 23-24. (emphasis added). The court held that "CBS fulfilled its duty to take *preventive* measures as a matter of law by adopting and promoting awareness of its anti-harassment policy." App. 13. (emphasis in original). It further found that CBS took reasonable steps to correct the harassment through Falcone's meeting with Hardage and giving him the aforementioned three options for dealing with the harassment. App. 13-14.

The court found that CBS was relieved of any duty to investigate or take other corrective action when Hardage accepted CBS's offer for him to deal with the harassment on his own. App. 14, 25-28. The court further held that because Hardage did not volunteer the "gory details" to Falcone or apprise Dean of the "specifics about sexual

contact," there could be no duty to further investigate Hardage's complaints or take disciplinary action. App. 15. The Ninth Circuit acknowledged that Dean's suggestion to Hardage to just have sex with Sparks and get it over with "is certainly troubling. However, it cannot singularly serve to transform CBS's response into an unreasonable one, nor can it erase the legal significance of his specific request not to investigate." App. 15. Therefore, the court held that "CBS's response was both prompt and reasonable as a matter of law." App. 15.

Judge Paez dissents strongly from the holding that CBS acted reasonably to prevent and correct harassment. Judge Paez stresses that all three of the options that Falcone gave Hardage were unreasonable and that an employer is never relieved of its duty to investigate a complaint of harassment once it is on notice of the harassment. App. 28-29.

> There is simply no authority for the proposition that an employer who is on notice of unwanted sexual advances is relieved of the duty to investigate and take corrective action merely because the employee did not *volunteer* the details of the harassing conduct during his initial complaint to the employer, especially where – as here – the employer never *asked* for specifics. The very point of an investigation is to gather the details about the alleged harassment. *See* EEOC Enforcement Guidance § V.C.1.e.i [(No. 915.002, June 18, 1999)] (providing examples of appropriate questions to ask the complainant during an investigation, including, "Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where*

> did it occur? *How* often did it occur? *How* did it affect you?").

App. 30. Emphasis in original.

The Ninth Circuit held that CBS established the second part of the *Faragher/Ellerth* affirmative defense as a matter of law. It held that by waiting until October 2000 to file a formal complaint and by "specifically requesting the company not make use of its remedial and preventative procedures, Hardage unreasonably failed to make use of CBS's anti-harassment policies and procedures." App. 18.

In his dissent, Judge Paez disagrees that CBS established, as a matter of law, the second prong of the affirmative defense. App. 35. Judge Paez explains that Hardage complained about the harassment to management on numerous occasions before October 2000. App. 36. And, holds Judge Paez, even if Hardage delayed in reporting the harassment and that delay "can be viewed as unreasonable in light of the circumstances, this is a matter for a jury to decide." App. 37. As to Hardage's decision to handle the situation on his own, Judge Paez stresses:

> Hardage opted to handle the matter himself only *after* Falcone provided him with the aforementioned legally inadequate response options. Under these circumstances, it can hardly be said that Hardage's decision to deal with Sparks' sexually harassing actions himself is per se unreasonable in light of his other options that were "do absolutely nothing" or have Falcone, who promised not to take any disciplinary actions against Sparks, "very nicely talk with her . . . and ask [her] to please, let's just lay back on this a little bit."

App. 37-38. Emphasis in original.

Petitioner seeks review of only the primary issue at odds with Supreme Court precedent: whether an employer can establish the *Faragher/Ellerth* affirmative defense, *as a matter of law*, when the victim of sexual harassment accepts the employer's suggestion that the company do nothing and that the employee handle the sexual harassment on his/her own.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's ruling meets two separate and independent bases for certiorari review.

First, as explained in detail in subsection I below, it raises "an important question of federal law that has not been, but should be, settled by [the United States Supreme] Court." Sup. Ct. R. 10(c). This Court has not specifically described what it means for an employer to reasonably prevent and correct harassment or for an employee to unreasonably fail to take advantage of corrective opportunities. However, this Court's opinions demonstrate that the purpose of the affirmative defense will be severely undermined if the Ninth Circuit's ruling is allowed to stand. Thus, the Ninth Circuit's ruling below "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Therefore, this case satisfies at least one of the alternative criteria in Sup. Ct. R. 10(c) for certiorari.

Second, the Ninth Circuit's ruling constitutes "a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct.

R. 10(a). No other court follows the Ninth Circuit's rule that an employer is relieved of liability for a supervisor's sexual harassment, as a matter of law, when it offers the complaining employee the option of doing nothing or handling the harassment on his/her own, and the employee accepts that option.

I. The Ninth Circuit's Decision Raises An Issue Of National Importance That Should Be, But Has Not Yet Been, Settled By This Court.

The primary purpose of Title VII of the Civil Rights Act is to influence employers to act in a way that will *prevent* avoidable harm from unlawful discrimination. *Faragher*, 524 U.S. at 806. The Ninth Circuit's holding allows employers to circumvent the *Faragher/Ellerth* requirement to prevent and correct sexual harassment simply by offering a complaining employee the option to keep the matter confidential and do nothing about it. App. 26-29.

The Ninth Circuit's decision affects how employers will respond to complaints of *all* unlawful harassment, not just complaints of sexual harassment. App. 101. *Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, § II, No. 915.002 (6/18/99) (hereafter "*EEOC Guidance*") (noting that the *Faragher/Ellerth* affirmative defense applies to harassment by supervisors based on race, color, sex, religion, national origin, protected activity, age, or disability). This decision will encourage employers to give employees who complain of harassment the option to forego the employer's investigative and remedial process. If an employee accepts that option, whether out of a rational or irrational fear of

retaliation or pride in handling matters on his or her own, this decision allows the employer to forego an investigation and still avoid liability, *on summary judgment*.

The Ninth Circuit majority emphasized that Hardage's choice to handle the harassment on his own was sincere and informed. App. 73. However, the majority ignores that this decision was made only after Hardage sought out help from CBS by lodging a formal complaint of sexual harassment and after Falcone told him that he could handle it on his own. Specifically, Falcone testified that his advice was as follows: "I think you have to be strong enough to be able to open up respectfully and nicely without offending anybody. So the second choice you would have would be to go to Kathy yourself." ER 453.

This is not a case in which an employee impedes an employer's ability to conduct an investigation by misleading the employer or refusing to answer the employer's investigative questions. Rather, this case is about whether an employer is *completely relieved* of its duty to prevent and correct harassment when the victim decides to handle the harassment on his/her own based on the employer's presentation of that as a viable option. The Ninth Circuit did not merely allow a reduction of damages for its conclusion that Hardage unreasonably failed to mitigate his damages, it completely relieved CBS of *all* liability on summary judgment.

The national importance of this case is well demonstrated by a simple Google.com search of "Hardage v. CBS." An astonishing number of articles written by lawyers across the country in just the last few months discuss the significance of the Ninth Circuit's decision. Professors have already added the case to course syllabi.

App. 143. Employment discrimination case books have been supplemented with the Ninth Circuit decision. App. 144. A Shepard's or Key Cite report shows that well over a dozen trial and appellate briefs have already cited the Ninth Circuit's opinion as authority in sexual harassment cases.

If the Ninth Circuit's opinion is allowed to stand as binding and persuasive authority for courts and employers across the country, there is a significant risk that employers will fail to take investigative and corrective steps that are necessary to prevent harassment from occurring in the workplace. *See* Jay W. Waks & William Poorten, *9th Cir. "Hardage" Ruling*, 28 NLJ 19, Col. 1 (January 16, 2006). App. 145-150.

II. The Ninth Circuit's Decision Conflicts With This Court's Prior Rulings.

When creating the *Faragher/Ellerth* affirmative defense, this Court stressed the importance of encouraging employers to take all steps necessary to prevent sexual harassment from occurring. *Faragher*, 524 U.S. at 806. The affirmative defense is designed to encourage employers to establish "effective grievance mechanisms" and to encourage employees to report sexual harassment. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 145, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004). To establish the defense, the employer must prove by a preponderance of the evidence "*both* that 'the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,' *and* that 'the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

otherwise.'" *Id.* (*quoting Faragher*, 524 U.S. at 807 and *Ellerth*, 524 U.S. at 765) (emphasis added).

This Court has not defined what it means to "unreasonably fail to complain," but the Ninth Circuit's decision simply cannot embody this Court's intent when establishing that defense.[2] If employers are allowed to avoid liability by advising their employees that the company can "do nothing" or the employee can deal with the harassment on his/her own, the preventative purpose of the affirmative defense is lost.

Moreover, the Ninth Circuit's decision essentially eviscerates this Court's requirement that an employer establish *both* elements of the affirmative defense. Under the Ninth Circuit's decision, the employer must only prove that the employee unreasonably failed to take advantage of preventative or corrective opportunities. Assuming that the Ninth Circuit majority is correct, and it is unreasonable for an employee to accept an employer provided option to handle the harassment on his/her own, then it cannot, at the same time, be *reasonable* for the employer to provide that option to the employee. The Ninth Circuit's circular decision in this regard relieves the employer of the obligation to take advantage of the same preventative or corrective opportunities required of the employee.

This Court has not explicitly defined what steps an employer must take to prevent and correct sexual harassment. However, in response to *Faragher* and *Ellerth*, the Equal Employment Opportunity Commission ("EEOC") created detailed guidance to assist employers in meeting

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[2] Seven of the Court's current Justices decided the *Faragher* and *Ellerth* opinions.

that task. App. 96-139. The guidance requires employers to investigate and correct harassment even when the harassed employee requests that the employer refrain from an investigation:

> A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.

EEOC Guidance, § V.C.1.d. App. 109-110. "When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation." *Id.*, at § V.C.1.c. App. 108. "Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively." *Id.*, at § V.C. App. 104-105. "[I]f the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable care." *Id.* App. 105.

If employers are allowed to forgo an investigation of harassment upon the victim's request, very few investigations will occur because employers will have an incentive to seize on an employee's natural fears of retaliation. *See EEOC Guidance*, § V.C.1.b., n.59 (citing surveys that

demonstrate how employees often fail to report harassment out of a fear of retaliation and a significant proportion of harassment victims *are worse off* after complaining). App. 107, 131. An anti-harassment policy is not effective unless the employer assures its employees that it will not tolerate adverse treatment of employees because they report harassment. *Id.*, at § V.C.1.b. App. 107.

This Court squarely placed the burden on employers to establish each element of the affirmative defense by a preponderance of the evidence. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Because the *Faragher/Ellerth* affirmative defense is based on a determination of reasonableness, summary judgment should not be granted when reasonable minds may differ about the reasonableness of the employer's actions. Even if the EEOC's Guidance is wrong and employers may reasonably choose to forego investigations *in some circumstances*, that is a question of fact for the jury. Reasonable minds can differ as to whether it is reasonable for an employer to forego an investigation because the complaining employee is concerned about retaliation. Where an employer fails to conduct an investigation or even discuss a complaint of harassment with the alleged harasser, the question of whether the employer meets the first prong of the affirmative defense is for the jury to decide.

In this case, Judge Paez's dissent demonstrates that reasonable minds can differ as to the reasonableness of CBS's response to Hardage's complaints of sexual harassment. App. 34-35.

By suggesting that Hardage's options for dealing with the harassment included doing nothing or dealing with it on his own, Falcone essentially ratified Hardage's fear

that he should not have reported the matter. Before talking with Falcone, Hardage wanted CBS's help in dealing with the harassment. Otherwise, why would he have decided to make a formal complaint? And again, it cannot be *reasonable, as a matter of law*, for Falcone to encourage Hardage to deal with the harassment on his own and for the company to do nothing, while at the same time be *unreasonable, as a matter of law*, for Hardage to accept that option.

III. The Ninth Circuit's Decision Conflicts With Other Circuits That Require Employers To Investigate Once They Are On Notice Of Potential Harassment.

Other circuits follow the EEOC's approach to preventing and correcting harassment. Although not applying the affirmative defense directly, the Second Circuit noted the importance of an employer's investigation of sexual harassment complaints, even when the victim employee desires to drop the matter:

> [A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer. . . . Nor is the company's duty to investigate subordinated to the victim's desire to let the matter drop. Prudent employers will compel harassing employees to cease all such conduct and will not, even at the victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment.

Malik v. Carrier Corp., 202 F.3d 97, 105-106 (2d Cir. 2000).

Likewise, the Sixth Circuit requires employers to take reasonable steps to prevent and correct harassment once they know about it. "[R]egardless of whether the victimized employee actively complained, prong one . . . ensures that an employer will not escape vicarious liability if it was aware of the harassment but did nothing to correct it or prevent it from occurring in the future." *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir. 2005).

The First Circuit Court of Appeals held that an employer is not entitled to a *Faragher/Ellerth* affirmative defense jury instruction where the employer failed to investigate complaints of harassment or take any corrective action, which contradicted the employer's own policy. *Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75, 87 (1st Cir. 2006). *Arrieta-Colon* holds that an employer is not entitled to the defense *as a matter of law* where it fails to investigate or otherwise take corrective actions to prevent further harassment. *Id.* Hardage simply asks that a jury be allowed to answer the question of whether an employer's failure to investigate a complaint of harassment is consistent with the employer's duty to prevent and correct harassment.

Like the First, Second, and Sixth Circuits' requirement that employers investigate and respond to complaints of harassment or harassment that the employer is otherwise aware of, the Fourth Circuit requires employers to fully investigate harassment and, at a minimum, discuss the complaint of harassment with the accused harasser. *Smith v. First Union National Bank*, 202 F.3d 234 (4th Cir. 2000). In *First Union*, the court held that "Employers cannot satisfy the first element of the *Faragher-Ellerth* affirmative defense if its management-level employees are discouraging the use of the complaint

process." *Id.*, at 245. It further held that the employer's investigation was inadequate. *Id.*

Although the victim alerted First Union that the harasser's hostile behavior related to her gender, its investigation focused on the alleged harasser's management style. The employer never even mentioned the topic of sexual harassment to the alleged harasser and never questioned the alleged harasser about the allegations of sexual harassment. *Id.*, at 245-246. As a result of the inadequate investigation, "a jury could find that First Union did not act with reasonable care to correct promptly [the] harassing behavior." *Id.*, at 246.

In this case, CBS was aware that Hardage was complaining of sexual harassment and that he resigned because of it. App. 29; ER 329. The majority ignores this fact, and instead focuses on Hardage's testimony that he did not volunteer the "gory details" in his initial complaint to Falcone and that because he did not volunteer the details, "Falcone had no way to know of its severity." App. 73. Contrary to the court's opinion, Falcone could have discovered the severity of the harassment by conducting an investigation, as required by CBS's policy, and by asking the basic who, what, when and where questions listed in the *EEOC Guidance*. App. 30, 111-113.

A victim's *refusal* to provide information about harassment *may*, in some cases, prevent an employer from being able to adequately investigate and correct the harassment. But an employee's failure to *volunteer* information, during a short car ride to the airport, that is not asked of him cannot similarly prevent the employer from investigating the harassment. App. 30.

A reasonable juror could conclude that Falcone's suggestion that Hardage could do nothing or handle the harassment on his own discouraged Hardage from taking advantage of CBS's policy against harassment. Likewise, a reasonable juror could find that Dean's suggestion to have sex with Sparks to get it over with and put her in a better mood discouraged Hardage from believing that his complaints would be taken seriously.

Although it was aware that Hardage was making a complaint of sexual harassment, CBS did not even inform Sparks that a complaint had been lodged against her. It took no steps towards correcting the problem. As a result, Sparks continued her sexual advances and went so far as to rub Hardage's back, chest and leg at the March 2001 dinner with Sparks and her mother. CBS could have, and should have, prevented this continued harassment by, at a minimum, informing Sparks that it would not tolerate such behavior. Instead, CBS negligently permitted the supervisor harassment to occur because of its failure to act, at all, to prevent or correct sexual harassment that it knew about through Paul Falcone, Ray Rajewski, and Patty Dean.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court grant certiorari in this case to resolve the very important question presented by this petition, and to eliminate the conflict between the Ninth Circuit and this Court, as well as the Equal Employment Opportunity Commission and at least four other circuits.

Respectfully submitted,

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427 F.3d 1177

United States Court of Appeals,
Ninth Circuit.
Hugh HARDAGE, Plaintiff-Appellant,
v.
CBS BROADCASTING INC., a New York Corporation; Viacom Television Stations Inc., a Delaware Corporation; Viacom Broadcasting of Seattle Inc., a Delaware Corporation; Kathy Sparks, an individual, Defendants-Appellees.
No. 03-35906.

Argued and Submitted May 3, 2005.
Filed Nov. 1, 2005.

Claudia Kilbreath, Short Cressman & Burgess PLLC, Seattle, WA, for the plaintiff-appellant.

Harry J.F. Korrell and Kathryn S. Loppnow, Davis Wright Tremaine LLP, Seattle, WA, for the defendants-appellees.

Appeal from the United States District Court for the Western District of Washington; John C. Coughenour, Chief Judge, Presiding. D.C. No. CV-02-01303-JCC.

Before: WALLACE, SILVERMAN, and PAEZ, Circuit Judges.

WALLACE, Judge:

The district court entered summary judgment dismissing Hardage's sexual harassment and retaliation claims against CBS Broadcasting Inc., Viacom Television Stations Inc., and Viacom Broadcasting of Seattle Inc. (collectively, CBS), pursuant to Title VII of the 1964 Civil Rights Act and the Washington Law Against Discrimination (WLAD). The district court concluded that CBS was

entitled to assert an affirmative defense to liability based on the Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and it accordingly denied Hardage's motion for partial summary judgment on that issue. In addition, the court declined to exercise supplemental jurisdiction over Hardage's WLAD claims against Kathy Sparks (the alleged harasser) and dismissed those claims without prejudice. *See* 28 U.S.C. § 1367(c). The court also dismissed Hardage's Title VII claims against Sparks with prejudice, and Hardage does not appeal this portion of the court's judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

In the summer of 1998, Hardage began working as an advertising account executive for KSTW-TV, a television station owned by Viacom Television Stations, Inc. and managed by CBS Broadcasting Inc. He was promoted to Local Sales Manager in February of 2000, and in this position he worked with another Local Sales Manager, Nadene Stauffer, to manage and supervise the account executives. Both Hardage and Stauffer were supervised by Patty Dean, the General Sales Manager, who was in turn supervised by defendant Sparks, the station's General Manager. Until about a month before Hardage resigned in August of 2001, he worked in the Seattle sales office whereas Sparks worked in the management office in Tacoma.

Hardage contends he was sexually harassed by Sparks on several occasions and subjected to retaliation

after he rejected her advances. He alleges that during Sparks' visits to the Seattle office, she repeatedly flirted with him and made inappropriate comments – such as "[y]ou need somebody that's older and more stable that can take care of you." Leo Elbert, another employee at KSTW, stated that Sparks would "camp out" in Hardage's office, kick back in his chair with her feet on his desk, and smile and giggle in a flirtatious manner. Hardage asserts that he never flirted with Sparks, but that he is a "flirtatious person by nature" and that there was "playful banter from the git-go" with Sparks, some of which he concedes could have been perceived as mutually flirtatious. He has also stated that he referred to Sparks as "Sparkalicious," "Baskin Robbins 32nd Flavor" and "Driving Ms. Sparky." He also agreed in his deposition that his love life in general was "[d]efinitely" part of the "watercooler talk" and "a big topic of conversation around the office."

In addition to the charged workplace harassment, Hardage alleges more serious harassment on five occasions outside of the office. First, on Easter Sunday in 2000, Hardage, Sparks, Dean, Dean's husband, and a few others attended a brunch at the Sorrento Hotel. Hardage believes that he might have been the person who invited Sparks to the event. The group consumed alcoholic beverages and eventually relocated to a sports bar. Hardage drove Sparks in her car. After a few more drinks, Sparks allegedly asked Hardage if her hands were pretty, and then put her foot on an air hockey table while Hardage was playing and asked if he thought she had cute feet. Later, while Hardage was on a skateboard game, Sparks allegedly got up on the skateboard behind him, put her arms around his waist and told him that he had a "cute ass."

After the sports bar, the group went to the Paragon restaurant for dinner and continued drinking alcoholic beverages. Sparks sat across the table from Hardage and allegedly took off her shoe, slid under the table, and put her foot in Hardage's crotch. At the end of the dinner, many people commented that Sparks was too drunk to drive home, and Sparks asked if she could stay at Hardage's apartment for the night. Hardage declined her request and, according to one witness, Sparks became "livid" and "stormed off" to drive herself home.

The second incident of harassment outside the workplace allegedly occurred two days after the Easter Sunday events. Sparks called Hardage and invited him to the Icon Grill restaurant for drinks after work. At the restaurant, she allegedly told Hardage she had not been able to sleep and "was having orgasms in her sleep." She asked Hardage if he felt the same way about her; Hardage replied that he did not want to damage his career by having a relationship and wanted to go no further than friendship. Hardage asserts that Sparks responded with a snide comment along the lines of, "Don't forget who got you to where you are."

Third, in August of 2000, Hardage and Sparks were both traveling to Texas to visit their respective families. Sparks arranged her travel plans so that she and Hardage sat next to each other on the same flight. Hardage alleges that Sparks took off her shoe and started rubbing her foot on his leg. After he asked her to stop, she began rubbing his back "in a kind of a weird manner." Sparks later referred to Hardage as her boyfriend as she was ordering drinks from a flight attendant, and as they were consuming their drinks, she grabbed his hand and made explicit sexual advances. Hardage contends that she offered him

oral sex and told him that one experience of sexual intercourse with her would be life-altering for him. Hardage told her that nothing physical would happen between them.

The fourth incident of alleged harassment occurred in October of 2000, when Hardage and Sparks took some of KSTW's clients to a baseball game. This is the only alleged instance of harassment outside the workplace that occurred during a work-related event. Hardage and Sparks sat next to each other, and Sparks began rubbing his leg with her foot. Hardage responded, "Kathy, cut it out, you know, we got clients sitting next to us, it's inappropriate." Later, Sparks allegedly took off her rain poncho, put it over Hardage's lap and reached under it for Hardage's crotch. Hardage states he elbowed her hand away and told her to stop.

After the game, Hardage invited Sparks to join him for drinks with his friends at the Pesos bar. Sparks allegedly glared at Hardage while he greeted his friends, including several women, and shouted, "Who haven't you f–ed in here?" Hardage states he pointed to one woman and responded jokingly, "I haven't f–ed anybody in here, you know, but hopefully she's next." Sparks became very upset, asked to be taken back to her car, and shouted obscenities to Hardage. One witness, Leo Elbert, has stated that Sparks told Hardage, "Don't f--ing talk to me. You're finished."

The day after the Pesos incident, Hardage complained to Dean and told her that "[l]ast night, things went way too far" and that Sparks had lost her temper. However, Hardage has stated that he did not tell her "specifics about sexual contact" and never told Dean that Sparks had

touched him in an inappropriate way, nor did he share any details of the harassment with anyone else at work.

Hardage also testified that Dean later suggested something "to the effect of . . . 'Why don't you just do it and get it over with. It may put her in a better mood.'" However, when Hardage told Dean about the Pesos incident, Dean promptly contacted Ray Rajewski, an executive vice president, who in turn called Hardage to let him know that he would be contacted by Paul Falcone, a representative from the company's human resources department. Falcone called Hardage the same day of Hardage's complaint and arranged to meet with him in person the following week.

During their subsequent meeting – which occurred while Hardage drove Falcone to the airport – he did not give Falcone details about the harassment; indeed, he "didn't share any of the so-called gory details with anybody." Instead, he gave Falcone "[j]ust the broad statement . . . that [Sparks] had made . . . unwanted sexual advances that were denied," that he was uncomfortable with the situation, and that Sparks had lost her temper and was "jeopardizing . . . the success of the team." Hardage did not tell Falcone about any of the alleged physical contact or groping by Sparks.

It is also undisputed that although Falcone offered to talk to Sparks and treat Hardage's complaint as an anonymous complaint, Hardage insisted on handling the situation by himself. Hardage explained in his deposition that he did not think the complaint could be handled truly anonymously, because Sparks would know the source, and that he "prided [him]self in handling [his] own business affairs." Approximately two weeks after their meeting,

Falcone called Hardage to follow up, and Hardage informed Falcone that nothing new had happened and that he still did not want Falcone to intervene.

In addition to sexual harassment, Hardage contends he was subjected to retaliation. Sparks made snide comments, such as, "your number's up" and, "It's not going to be me that loses my job, it's going to be you."

About the same time, Hardage's performance was called into question. When Hardage and another Local Sales Manager, Stauffer, repeatedly failed to meet sales goals due to a slump in the advertising market, Dean counseled them on several occasions and sent them joint memoranda discussing their performance issues. Furthermore, on August 6, 2001, Dean sent Hardage a memorandum which cited problems with his work performance, including his insubordination in failing to return to work after attending a charity event. Hardage has conceded that he had in fact been insubordinate. The memorandum indicated that Hardage and Dean would have a formal meeting to reevaluate his performance in approximately thirty days, and it warned that a "[f]ailure to see significant improvement could result in [his] termination."

On August 31, 2001, Hardage submitted his letter of resignation. He testified that adverse market conditions had created a "pretty intense environment" and had "deflated [him] to the point that . . . was the end of [his] rope."

II.

Hardage asserts Title VII and WLAD claims of sexual harassment and retaliation against CBS. "Washington's

Law Against Discrimination tracks federal law, and thus our analysis will cite only federal law," but our analysis applies with equal force to Hardage's WLAD claims against CBS. *Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 925 n. 1 (9th Cir.2003), *citing Payne v. Children's Home Soc'y, Inc.*, 77 Wash.App. 507, 892 P.2d 1102, 1105-06 (1995); *see also Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966, 969 (9th Cir.2002) (Washington courts look to federal law when considering sex discrimination and retaliation claims).

We review the district court's summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the district court correctly applied relevant substantive law. *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1171 (9th Cir.2001). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citations omitted).

III.

Title VII provides that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). This anti-discrimination principle is violated when sexual harassment is sufficiently severe or pervasive to "alter the

conditions of[the victim's] employment and create an abusive working environment." *Montero v. Agco Corp.*, 192 F.3d 856, 860 (9th Cir.1999) (alteration in original), *quoting Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), *quoting Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir.1982).

An employer is vicariously liable "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 861. However, the Supreme Court has established an affirmative defense to vicarious liability:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, *see* Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. at 765, 118 S.Ct. 2257; *Faragher*, 524 U.S. at 807-08, 118 S.Ct. 2275. Thus, even if we assume that Hardage was sexually harassed, CBS can avoid liability if it can show that (1) it took no "tangible employment action" against Hardage, (2) it exercised reasonable care to prevent and correct harassment, and (3) Hardage unreasonably failed to take advantage of preventive or corrective

opportunities. We must determine whether, even viewing the evidence in the light most favorable to Hardage, he has failed to raise a triable factual issue as to each element of this defense, thus entitling CBS to summary judgment.

A.

A "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761, 118 S.Ct. 2257. A tangible employment action "requires an official act of the enterprise, a company act," and "in most cases inflicts direct economic harm." *Id.* at 762, 118 S.Ct. 2257.

While employed at KSTW-TV, Hardage never experienced any decrease in compensation, hours, title, duties or benefits. He contends, however, that he was constructively discharged as a result of a hostile work environment, and this constructive discharge constitutes a tangible employment action. *See Pa. State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 2351, 159 L.Ed.2d 204 (2004) (holding that constructive discharge precipitated by a supervisor's official act can constitute a "tangible employment action"). He cites the sexual harassment by Sparks as well as allegedly retaliatory actions – namely, the adverse performance memoranda he and Stauffer received, Sparks' snide remarks, and the August 6, 2001 memorandum warning Hardage that his performance would be reevaluated after a thirty-day period. He contends that after "enduring the severe and pervasive harassment . . . and retaliation," he "finally came to the conclusion that CBS

would not take his complaints seriously" and saw "no way out" but to resign. He also argues he was constructively discharged by being placed on "the same kind of probation under which [he] had seen other employees consistently lose their jobs."

These arguments miss the mark. In order to survive summary judgment on a constructive discharge claim, a plaintiff "must show there are triable issues of fact as to whether 'a reasonable person in [his] position would have felt that [he] was forced to quit because of intolerable and discriminatory working conditions.'" *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir.1994); *see also Suders*, 124 S.Ct. at 2347. In *Montero*, 192 F.3d at 861, we held that the plaintiff was not constructively discharged in part because the sexually harassing behavior had ceased three to four months before the plaintiff's resignation. *See also Steiner*, 25 F.3d at 1465-66; *Manatt v. Bank of Am., NA*, 339 F.3d 792, 804 (9th Cir.2003). Hardage concedes that the last time Sparks made inappropriate sexual advances or comments was in March of 2001, yet he did not resign until five months later, on August 31, 2001. As a result, even if Sparks' sexual harassment created a hostile work environment, such harassment ceased well in advance of Hardage's resignation.

Nor do the allegedly retaliatory actions taken against Hardage amount to a constructive discharge. CBS has proffered legitimate, non-retaliatory reasons for the adverse performance memoranda, which were addressed to *both* Hardage and Stauffer. *See Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir.2000) ("[C]onstructive discharge occurs when the working conditions deteriorate, *as a result of discrimination*, to the point that they become 'sufficiently extraordinary and egregious'" (citation omitted)

(emphasis added)). Indeed, it is undisputed that Hardage was insubordinate and failed to meet sales goals in his last few months as a Local Sales Manager.

For this reason, even if we consider the memoranda as tangible employment actions in and of themselves, rather than as components of a constructive discharge, they do not bar CBS from asserting the *Ellerth/Faragher* defense. *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 959 (9th Cir.2004) ("[E]ven if a tangible employment action occurred, an employer may still assert the affirmative defense if the tangible employment action 'was unrelated to any harassment or complaint thereof'" (*quoting Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 877 (9th Cir.2001))); *Kohler*, 244 F.3d at 1180 ("Kohler cannot connect any of the alleged employment actions she experienced to her rejection of [her supervisor]'s advances. Therefore, Kohler has failed to demonstrate a disputed factual issue as to whether she suffered a tangible employment action").

As for the allegedly snide remarks, the Supreme Court has emphasized that only a constructive discharge which is precipitated by an "official act" can constitute a "tangible employment action." *Suders*, 124 S.Ct. at 2355. An official act is "'the means by which the supervisor brings the official power of the enterprise to bear on subordinates.'" *Id.* at 2353, *quoting Ellerth*, 524 U.S. at 762, 118 S.Ct. 2257. Sparks' occasional comments clearly are insufficient under this standard. Thus, Hardage has failed to establish a material factual dispute as to whether he was constructively discharged, and he has not alleged any other "tangible employment action."

B.

In order to assert the *Ellerth/Faragher* defense successfully, CBS must have "exercise[d] reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257; *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275. In *Kohler*, 244 F.3d at 1180-81, we construed this standard to require both preventive and remedial measures.

As for the former, we held that an employer's adoption of an anti-harassment "policy and its efforts to disseminate the policy to its employees establish that [the employer] exercised reasonable care to prevent sexual harassment in the workplace." *Id.* at 1180; *see also Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257. In this case, it is undisputed that CBS has an anti-harassment policy, with which Hardage had familiarity. As a supervisor, he was responsible for reporting sexual harassment to the human resources department, and he understood that sexual harassment was prohibited. Thus, CBS fulfilled its duty to take *preventive* measures as a matter of law by adopting and promoting awareness of its anti-harassment policy.

In addition, however, CBS must have taken steps to *correct* Hardage's particular situation promptly. *See Kohler*, 244 F.3d at 1181 ("The [reasonable care] prong of the affirmative defense also requires [the employer] to demonstrate that it exercised reasonable care to promptly correct sexually harassing behavior"); *see also Montero*, 192 F.3d at 862. After Hardage complained to Dean in October 2000, Dean immediately contacted Rajewski, who in turn notified Falcone. Falcone called Hardage the same day he made his complaint, and shortly thereafter, they met in Seattle. At their meeting, Falcone discussed

Hardage's options. Hardage asserted that he wanted to "handle it by [him]self." Approximately two weeks later, Falcone followed up with Hardage by telephone, and Hardage indicated that he still did not want Falcone to intervene. This would appear to end any debate on this issue, but Hardage makes two arguments as to why there is a triable factual dispute regarding this requirement.

First, he emphasizes Falcone's "inexplicabl[e]" failure to investigate his complaint or discipline Sparks. In *Swenson v. Potter*, 271 F.3d 1184 (9th Cir.2001), we explained that "[n]otice of the sexually harassing conduct triggers an employer's duty to take prompt corrective action that is 'reasonably calculated to end the harassment.'" *Id.* at 1192 (citations omitted). "The reasonableness of the remedy depends on its ability to: (1) 'stop harassment by the person who engaged in harassment;' and (2) 'persuade potential harassers to refrain from unlawful conduct.'" *Nichols*, 256 F.3d at 875. Although an "investigation is a key step," *Swenson*, 271 F.3d at 1193, we "consider the overall picture" to determine whether the employer's response was appropriate. *Id.* at 1197.

To be sure, CBS's anti-harassment policy states that "[f]ollowing a complaint, a thorough investigation will be made" and the "matter will be handled in the *strictest of confidence.*" Hardage was convinced, however, that there was "absolutely no way that [his complaint] could be handled anonymously," and he therefore told Falcone he wanted to handle the situation by himself. Indeed, he stated that when Sparks later mentioned the words "sexual harassment" to him, he "felt like [his] trust had been possibly violated by corporate and – leaking information, because [he had] stated [he] wanted to handle the case on [his] own."

In addition, although Hardage did put CBS on notice of Sparks' "unwanted sexual advances," he did not tell Falcone the "gory details" or apprise Dean of the "specifics about sexual contact." Instead, he was vague about the extent and nature of Sparks' advances. Thus, even if a more thorough investigation and disciplinary measures for the harasser could in some circumstances be essential in spite of a harassed employee's request to handle the situation, there can be no such duty in this case. *See Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir.1991) ("[R]emedies should be 'assessed proportionately to the seriousness of the offense' "); *cf. Nichols*, 256 F.3d at 870-71 (employer failed to meet remedial obligations after employee "reported and described the specifics of the harassment" to a human resources director, and "expressed concern that the harassment would continue to be ignored"). Dean's alleged comment to Hardage that "Why don't you just do it and get it over with. It may put her in a better mood" is certainly troubling. However, it cannot singularly serve to transform CBS's response into an unreasonable one, nor can it erase the legal significance of his specific request not to investigate his admittedly minimal and vague complaint. Considering the "overall picture," CBS's response was both prompt and reasonable as a matter of law.[1]

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[1] The dissent accuses us of "depart[ing] from well-settled case law requiring an employer to conduct an investigation and take prompt corrective action once it is on notice of alleged harassment." This "well-settled case law" appears to consist of a single out-of-circuit case, *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir.2000). *Malik*, however, addressed a significantly different legal context. In *Malik*, the Second Circuit considered state law claims by a man accused of harassment. Malik filed suit for negligent infliction of emotional distress and negligent misrepresentation arising out of the investigation of complaints against

(Continued on following page)

Alternatively, Hardage contends there is a triable factual dispute as to whether CBS was on notice prior to his complaint to Dean in October of 2000. He alleges that he made "numerous complaints" to Dean and repeatedly told her he did not want to be left alone with Sparks. Yet when counsel for CBS asked Hardage during his deposition to state every time he could recall speaking to Dean about Sparks' behavior, Hardage vaguely suggested a barbeque event and a concert at the Mercer Coliseum, but he could not remember the dates or what he told Dean about why he did not want to attend the events. Hardage recalled that he may have told Dean he did not want to be alone with Sparks – which Hardage asserts was "an ongoing joke" – but such a statement would hardly have given Dean notice of ongoing sexual harassment. Even drawing all reasonable inferences in favor of Hardage, these undetailed allegations are "merely colorable" and insignificantly probative to create a genuine factual dispute about whether CBS's response was reasonable. *See Anderson*, 477 U.S. at 249- 50, 106 S.Ct. 2505; *see also McPherson v. City of Waukegan*, 379 F.3d 430, 441 n. 7 (7th Cir.2004) ("'When . . . the only possible source of notice to the employer . . . is the employee who is being

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him. 202 F.3d at 99. Malik's accusers never requested that their complaints not be investigated. *See id.* at 100-02. Thus *Malik* bears little resemblance to the present action and the quoted language is at best dicta from another circuit.

There is thus no precedent to support the dissent's claim (at 1192) that "even if a complainant requests that the employer take no action, an employer still must fulfill its duty" to investigate the complaint. It is therefore the dissent that would "depart from well-settled" precedent by requiring an investigation in all circumstances no matter how strenuously or repeatedly the alleged victim asked the company to forego investigation.

harassed, she cannot withstand summary judgment without presenting evidence that she gave the employer enough information to make a reasonable employer think there was some probability that she was being sexually harassed.'" (*quoting Zimmerman v. Cook County Sheriff's Dep't*, 96 F.3d 1017, 1019 (7th Cir.1996))).

Hardage also argues that CBS was on notice of the harassment because Dean personally observed some of Sparks' harassing behavior. Yet, Hardage has stated that Dean also witnessed "some flirtation," and he concedes that the mutual "banter" between Sparks and him could have been perceived as flirtatious. Taken in context, Dean did not unreasonably fail to report the incident to CBS management, thereby triggering CBS's duty to remedy the situation promptly.

In addition, Hardage suggests Dean "had the opportunity to observe the harassment on a daily basis in the workplace." However, until July 2001 – approximately ten months after Hardage complained to Dean in October 2000 – Hardage worked in Seattle and Sparks worked in Tacoma. Accordingly, Dean had limited opportunities to observe Hardage and Sparks together. Furthermore, given Hardage's playful names for Sparks such as "Sparkalicious" and their "playful banter from the git-go," his repeated invitations to Sparks to socialize with him outside of work, and his failure to inform Dean that Sparks' flirtations were unwelcome harassment, Dean did not unreasonably fail to report any flirtatious behavior by Sparks when she was visiting the Seattle office.

C.

We now turn to the third *Ellerth/Faragher* requirement: that Hardage unreasonably failed to take advantage of preventive or corrective opportunities. As a local sales manager in charge of supervising approximately ten employees, Hardage was well aware of CBS's anti-harassment policy and the procedure for initiating a complaint. Indeed, he testified he understood that "all actual sexual harassment in [his] workplace [was] dealt with in a serious manner." He contends that he "informally and formally reported the harassment on several occasions," and therefore he did not unreasonably fail to make use of remedial and preventive opportunities.

Yet, although Hardage contends the harassment commenced in April 2000, his first complaint to Dean that he has identified with specificity was in October 2000 – approximately half a year later. "[W]hile proof that an employee failed to fulfill the . . . obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under [this] element of the defense." *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257; *Faragher*, 524 U.S. at 807-08, 118 S.Ct. 2275; *see also Suders*, 124 S.Ct. at 2354 (the *Ellerth/Faragher* defense requires "plaintiffs reasonably to stave off avoidable harm"); *Kohler*, 244 F.3d at 1181-82. In addition to waiting half a year to make a complaint, when Hardage finally made his complaint he specifically asked the company not to investigate it. By specifically requesting the company not make use of its remedial and preventative procedures, Hardage unreasonably failed to make use of CBS's anti-harassment policies and procedures.

Thus, Hardage has failed to establish a material factual dispute regarding any of the three elements of CBS's affirmative defense. The district court properly entered summary judgment for CBS and denied partial summary judgment for Hardage on his sexual harassment claim.

IV.

Title VII prohibits retaliation against an employee for opposing unlawful discrimination. 42 U.S.C. § 2000e-3(a). To make out a prima facie case of retaliation, Hardage must show that (1) he engaged in a protected activity, such as the filing of a complaint alleging sexual harassment; (2) CBS subjected him to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *See Manatt*, 339 F.3d at 800, *quoting Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir.2000); *Brooks*, 229 F.3d at 928. If Hardage makes a prima facie case, the burden shifts to CBS to articulate a legitimate, nondiscriminatory reason for the adverse action, and Hardage then bears the ultimate burden of demonstrating that this reason is pretextual. *Manatt*, 339 F.3d at 800.

Hardage contends he was subjected to retaliation in the form of adverse performance memoranda and being placed on a thirty-day probation period. In *Ray*, we recognized that "*undeserved* performance ratings, *if proven*, would constitute 'adverse employment decisions.'" 217 F.3d at 1241 (emphasis added), *quoting Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir.1987). Here, by contrast, it is undisputed that Hardage failed to meet sales goals and disobeyed Dean's instruction that he return to work after a charity event. Hardage therefore failed to prove a causal

link between the memoranda and Hardage's sexual harassment complaint. Furthermore, even if we assume that Hardage has established a prima facie case, we conclude he has failed to rebut CBS's legitimate reasons for the memoranda. *See Manatt*, 339 F.3d at 801. Moreover, except for the August 6 memorandum addressing Hardage's insubordination, Stauffer received the same performance memoranda. "Absent a showing of disparate treatment, the [employer's action] cannot be deemed retaliatory." *Brooks*, 229 F.3d at 929.

In addition, Hardage asserts that Sparks retaliated by making "snide remarks" and threats, such as "your number's up" and "don't forget who got you where you are." However, we have held that "only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations will constitute actionable retaliation." In *Kortan v. California Youth Authority*, 217 F.3d 1104, 1112 (9th Cir.2000), we held that a supervisor's laughing and stating that the plaintiff "got him on sexual harassment charges," the supervisor's hostile stares, and increased criticism were insufficient to preclude summary judgment dismissing the plaintiff's retaliation claim. *See also Brooks*, 229 F.3d at 929 (stating that badmouthing an employee outside the job reference context does not constitute adverse employment action); *Manatt*, 339 F.3d at 803 ("Mere ostracism in the workplace is not grounds for a retaliation claim. . . ."); *cf. Ray*, 217 F.3d at 1243 (definition of "adverse employment action" "does not cover every offensive utterance by co-workers, because offensive statements by co-workers do not reasonably deter employees from engaging in protected activity").

Moreover, even if Sparks' remarks collectively created a hostile work environment that constituted retaliation, such harassment "is actionable only if it is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Ray*, 217 F.3d at 1245. *quoting Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Considering the totality of circumstances, we hold that Sparks' comments are insufficiently severe to support a retaliation claim. *See Faragher*, 524 U.S. at 788, 118 S.Ct. 2275 ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" (citation omitted)).

V.

Because Hardage appeals from the district court's dismissal of his state WLAD claims against Sparks only by arguing they should be reinstated if summary judgment for CBS is reversed, we affirm the district court's dismissal of this claim as well. *See* 28 U.S.C. § 1367(c); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir.1997) (en banc) ("'[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims'" (omission in original) (*quoting Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988))).

AFFIRMED.

PAEZ, Circuit Judge, dissenting in part:

I agree that the district court properly granted summary judgment on Hardage's constructive discharge and retaliation claims, and that Hardage did not raise a triable issue of fact as to whether he suffered a tangible employment action. I cannot agree, however, with the majority's conclusion that CBS established as a matter of law the *Faragher/Ellerth* defense to vicarious liability for Sparks' sexual harassment. In reaching its conclusion, the majority departs from well-settled case law requiring an employer to conduct an investigation and take prompt corrective action once it is on notice of alleged harassment. Because a reasonable jury readily could find that CBS is vicariously liable for sexual harassment, I would reverse the grant of summary judgment and remand for a trial. Accordingly, I dissent from Parts III.B and III.C of the majority's opinion.

To establish the *Faragher/Ellerth* affirmative defense, an employer must prove by a preponderance of the evidence two necessary elements:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
>
> (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). An employer is not entitled to summary judgment on this issue unless there are *no* genuine disputes of

material fact as to either element of the defense. That is, summary judgment must be denied if a rational jury could conclude *either* that (1) the employer failed to exercise reasonable care to prevent and promptly correct any sexually harassing behavior, *or* that (2) the employee did not unreasonably fail to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Here, the record reveals genuine factual disputes as to both elements.

1. Whether CBS Acted Reasonably to Prevent and Correct the Harassment

It is well-established that "[n]otice of the sexually harassing conduct triggers an employer's duty to take prompt corrective action that is reasonably calculated to end the harassment." *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir.2001) (internal quotation marks omitted). The reasonableness of the remedy depends on the employee's ability to stop the harassment and to deter potential harassers, as well as the promptness of the response. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1120 (9th Cir.2004). Once an employer is on notice of a sexual harassment complaint, it *must* conduct an investigation. *Swenson*, 271 F.3d at 1193. An employer's remedial "obligation actually has two parts. The first consists of the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified. The second consists of the permanent remedial steps the employer takes once it has completed its investigation." *Id.* at 1192.

Contrary to our case law, the majority holds that an employer's response to a harassment complaint may be

deemed reasonable as a matter of law even though the employer conducted *no* investigation and took *no* action to address the harassing behavior. The majority relies on our statement in *Swenson* that "we consider the overall picture" in determining the adequacy of the employer's response to a harassment complaint. *Id.* at 1197. In *Swenson*, however, we never suggested that an investigation was not required. In fact, we specifically stressed the importance of an investigation, stating:

> The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified. An investigation is a key step in the employer's response, and can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, an employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by action.

Id. at 1193 (citation omitted).

In *Swenson*, we held that the investigation conducted by the employer was competent. We noted, however, that even if the investigation were "less than perfect," the employer's response was reasonable in light of the "overall picture," *id.* at 1197, which included the fact that the employer immediately warned the harasser that his conduct was sexual harassment and ordered him to keep away from the complainant, promptly separated him from the complainant pending the outcome of the investigation, and the harassment stopped as a result of the employer's intervention. *Id.* at 1192-98. We did not hold, nor have we

ever held, that an employer may be deemed to have reasonably responded to a harassment complaint when it altogether fails to conduct an investigation. Indeed, we have stated that "the 'fact of investigation alone' is not enough. An investigation that is rigged to reach a predetermined conclusion or otherwise conducted in bad faith will not satisfy the employer's remedial obligation." *Id.* at 1193 (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir.1995)).

Here, the majority acknowledges that Hardage told CBS's human resources representative, Ray Falcone, that Sparks had made "'unwanted sexual advances.'" Maj. op. at 1182. Yet, Falcone conducted *no* investigation and took *no* corrective action. Nor did he even inform Sparks that a complaint had been made, much less discipline her.[1]

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[1] Falcone testified in his deposition as follows:

Q: "Just to confirm, . . . based on your conversation with Mr. Hardage, you didn't conduct any investigation –

A: Correct.

Q: – of these claims?

A: Yes.

Q: And I take it that Ms. Sparks was never disciplined in any way?

A: No. I never even – my recommendation to Ray Rajewski was that it didn't even need to be brought to Kathy Sparks' attention.

Further, Patty Dean testified:

Q: Did Mr. Falcone ever contact you or interview you in any way regarding Mr. Hardage's complaints about Ms. Sparks?

A: No, I believe not.

Q: Okay. Did anyone at KSTW or CBS, the broader entity, ever contact you, ask you any questions, interview you, anything of that kind regarding Mr. Hardage's complaints about Ms. Sparks?

A. No."

Nonetheless, the majority concludes as a matter of law that CBS exercised reasonable care to correct Sparks' harassment. The majority relies on two facts: Hardage told Falcone he would handle the matter himself, and Hardage did not offer Falcone specific details about Sparks' sexually harassing behavior. Maj. op. at 1186. Neither is a valid reason for absolving CBS of its duty to investigate and correct Sparks' harassment.

First, a harassment complainant's request that an employer take no action does not relieve the employer of its obligation under the law to investigate and remedy the harassing conduct. The Equal Employment Opportunity Commission's ("EEOC") Enforcement Guidance on Vicarious Liability for Supervisor Harassment speaks precisely to this point:

> A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, § V.C.1.d, No. 915.002 (June 18, 1999) [hereinafter EEOC

Enforcement Guidance].[2] This same concern was expressed by the Second Circuit in *Malik v. Carrier Corp.*, 202 F.3d 97, 105-06 (2d Cir.2000). Although addressing slightly different circumstances, the Second Circuit in *Malik* noted the importance of an employer's investigation of sexual harassment complaints, even when the victim employee desires to drop the matter:

> [A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer. . . . Nor is the company's duty to investigate subordinated to the victim's desire to let the matter drop. Prudent employers will compel harassing employees to cease all such conduct and will not, even at a victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment.

Thus, contrary to the majority's holding, even if a complainant requests that the employer take no action, an employer still must fulfill its duty to prevent and correct the alleged harassment.

Moreover, while the majority purports to consider the "overall picture," its account of CBS's response to Hardage's complaint ignores critical facts indicating that CBS failed to act reasonably. The majority's summary of these events is brief: "[A]lthough Falcone offered to talk to Sparks and treat Hardage's complaint as an anonymous

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[2] We have held that the EEOC's interpretations of Title VII as expressed in this Enforcement Guidance "are entitled to respect." *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1172 (9th Cir.2003).

complaint, Hardage insisted on handling the situation by himself." Maj. op. at 1182. This account leaves out key aspects of Hardage's discussion with Falcone. After Hardage told Falcone that Sparks had made unwanted sexual advances, Falcone asked Hardage, "What would you like me to do?" In response, Hardage said he "really d[id]n't know," and asked, "What are my options? How do you usually handle these things?" Falcone testified that he then told Hardage he had three choices: (1) Hardage could "do absolutely nothing and hope it solves itself," (2) Hardage could talk to Sparks on his own, or (3) Falcone could "very nicely talk with" Sparks and ask her to "just lay back on this a little bit," but he assured Hardage he would not "yell at her and get her in trouble."

Notably, not one of these options fulfilled CBS's legal duty to investigate and correct the harassing behavior. The first two options flouted CBS's obligation to take prompt corrective action. *See Fuller*, 47 F.3d at 1529 ("[I]naction [cannot] fairly be said to qualify as a remedy 'reasonably calculated to end the harassment.' Title VII does not permit employers to stand idly by once they learn that sexual harassment has occurred. To do so amounts to ratification of the prior harassment." (citation omitted)). The second option also inappropriately put the burden on Hardage to correct the harassment. *See Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 876 (9th Cir.2001) (holding that an employer unreasonably responded to a harassment complaint when it "placed virtually all of its remedial burden on the victimized employee"). Finally, the third option – the only one proposing any action by CBS at all – improperly included a guarantee that CBS would not discipline Sparks in any way. *See McGinest*, 360 F.3d at

1120 ("Remedial measures must include some form of disciplinary action.").

It was only *after* Falcone presented these three legally inadequate options that Hardage said he would handle the situation himself. Even if an employer could be relieved of its duty to investigate and correct harassing behavior by virtue of a complainant's request to address it on his own – which it cannot – this certainly cannot be true where, as here, "the overall picture" reveals that CBS affirmatively misled Hardage about its own legal duty and offered him no meaningful alternative to handling the situation on his own. An employer may not shield itself from liability by erroneously telling a complainant that doing "absolutely nothing" is a valid response to harassment, and then justifying its inaction by stating it was merely respecting the employee's "choice."

Second, the majority incorrectly holds that "there can be no duty" to investigate or correct harassment where an employee fails to offer specific details of the harassing behavior in the course of making his initial complaint. The majority notes that Hardage said he "did not tell [Dean] 'specifics about sexual contact'" and did not tell Falcone the "'gory details'" of Sparks' behavior. Maj. op. at 1182. The majority, however, acknowledges that "Hardage did put CBS on notice of Sparks' 'unwanted sexual advances.'"[3] Maj. op. at 1186. This is all that is required to trigger CBS's duty to investigate and correct the harassment.

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[3] Indeed, Hardage testified that he told both Dean and Falcone that Sparks had made unwanted sexual advances, and Dean herself testified that she understood that Hardage was complaining about sexual harassment.

There is simply no authority for the proposition that an employer who is on notice of unwanted sexual advances is relieved of the duty to investigate and take corrective action merely because the employee did not *volunteer* the details of the harassing conduct during his initial complaint to the employer, especially where – as here – the employer *never asked* for specifics. The very point of an investigation is to gather the details about the alleged harassment. *See* EEOC Enforcement Guidance § V.C.1.e i (providing examples of appropriate questions to ask the complainant during an investigation, including, "Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?").

To support its conclusion that an employer has no duty to investigate where the complainant is "vague about the extent and nature" of a supervisor's sexual advances, the majority cites *Ellison v. Brady*, where we held that "remedies should be assessed proportionately to the seriousness of the offense." 924 F.2d 872, 882 (9th Cir.1991) (internal quotations omitted). In *Ellison*, however, we did not suggest that an investigation is a remedy that may or may not be imposed depending on the seriousness of the offense; indeed, there, the employer promptly investigated the complaint and requested that the harasser refrain from discriminatory conduct, yet we held that there was a genuine dispute of fact regarding the reasonableness of the remedy. *Id.* at 882-83. As we have made clear, "an investigation is principally a way to determine whether any remedy is needed and cannot substitute for the remedy itself." *Fuller*, 47 F.3d at 1529.

The majority also cites *Nichols*, where we stated that the complainant had reported "the specifics of the harassment." 256 F.3d at 870. In *Nichols*, however, we noted this fact in the context of holding that the district court clearly erred in finding that the complainant had not reported the harassment at all and in support of our conclusion that the complainant subjectively perceived his workplace to be hostile. *Id.* at 873 ("Sanchez told Serna, in considerable detail, about the fact and nature of the verbal abuse. Sanchez also complained to the Southcenter general manager and an assistant manager, though in less detail. It was clearly erroneous to find, as did the district court, that Sanchez had not complained about his harassment. . . . That Sanchez complained about the frequent, degrading verbal abuse supports our conclusion that the conduct was unwelcome").

Moreover, *Nichols* actually undermines the majority's conclusion. There, we noted that the plaintiff's complaints did not comply with the formal reporting requirements of the employer's anti-harassment policy; nonetheless, we held that the plaintiff's complaints "were sufficient to place the company on notice of the harassment." 256 F.3d at 876 n. 10. Because the employer did nothing to investigate or remedy the harassment despite this notice, we held that the employer did not exercise reasonable care and could not assert the affirmative defense to vicarious liability. *Id.* at 877. As in *Nichols*, the critical point here is that CBS was on notice of Sparks' unwanted sexual advances, yet failed to investigate or remedy the harassment.

Notice of Sparks' unwanted sexual advances triggered CBS's duty to investigate and take steps reasonably calculated to end the harassment. CBS's inaction in the

face of Hardage's complaint not only violated its legal duty, it also violated its own written policy on sexual harassment. This policy states:

> Following a complaint, a thorough investigation will be made by interviewing the individual(s) allegedly responsible for the harassment, and any witnesses. After the investigation, should it be determined that the allegations are true, then appropriate action will be taken, including, but not limited to, written reprimand, warning, suspension, demotion, or dismissal.

As noted, CBS admittedly never conducted an investigation of Hardage's complaint and never took any disciplinary action against Sparks. Indeed, Falcone testified that his "recommendation . . . was that it didn't even need to be brought to Kathy Sparks' attention." On this record, a rational trier of fact readily could conclude that CBS failed to exercise reasonable care to correct Sparks' harassing behavior. *See Fuller*, 47 F.3d at 1529 ("An employer whose sole action is to conclude that no harassment occurred cannot in any meaningful sense be said to have 'remedied' what happened.").

The majority's contrary conclusion marks a dramatic departure from our case law establishing that an employer breaches its duty of reasonable care when it fails to adequately investigate, and take steps to correct, harassing conduct. *See Nichols*, 256 F.3d at 866-68 (holding that employer did not exercise reasonable care to promptly correct sexually harassing behavior where it "made no effort to investigate Sanchez's complaint; it did not discuss his allegations with the perpetrators; it did not demand that the unwelcome conduct cease; and it did not threaten more serious discipline in the event the harassment

continued"); *Fuller*, 47 F.3d at 1529 (holding that employer could not be shielded from liability for sexual harassment where its investigation was inadequate, its offer to transfer victim improperly targeted the victim rather than the harasser, and the employer "failed to take *any* appropriate remedial steps once it learned of the harassment"); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir.1994) (reversing grant of summary judgment in favor of employer on vicarious liability where employer "was consistently slow to react to Steiner's claims, and did not seriously investigate them or strongly reprimand" the harasser until after Steiner filed a complaint with the state equal rights commission); *Ellison*, 924 F.2d at 882 (holding that genuine issues of fact precluded summary judgment for the employer even though it "promptly investigated" the harassment allegation, where it "did not express strong disapproval of Gray's conduct, did not reprimand Gray, did not put him on probation, and did not inform him that repeated harassment would result in suspension or termination").

CBS's conduct here is a far cry from actions that we have held fulfilled an employer's duty of reasonable care. For example, in *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1181 (9th Cir.2001) – where we stated that the facts "present a paradigm of the 'reasonable efforts' the Supreme Court sought to encourage when it established the affirmative defense" – the employer "responded by promptly hiring a neutral third party to investigate Kohler's allegations," and even though the investigator did not confirm the harassment claim, the employer nonetheless reviewed its antiharassment policy with the alleged harasser, reprimanded him for his behavior, and conducted mandatory sexual harassment trainings for the entire

workforce. *Id.*; *see also Holly D.*, 339 F.3d at 1177-78 (holding that employer acted reasonably as a matter of law where it "promptly convened an investigatory committee, which impartially interviewed every witness" suggested by the complainant and the alleged harasser; the employer reminded the harasser of its sexual harassment policy despite an initial determination that there was insufficient evidence of harassment; and once evidence came to light substantiating the victim's complaint, the employer asked the harasser to resign); *Montero v. Agco Corp.*, 192 F.3d 856, 862 (9th Cir.1999) (holding that employer exercised reasonable care where it promptly investigated the allegations, interviewed the complainant, the alleged harassers, and other employees at the facility, met with all employees "and made clear that the company would tolerate no retaliation against Plaintiff," terminated one of the harassers, and disciplined the two others). In contrast, CBS did nothing to investigate or remedy Sparks' behavior.

Even apart from CBS's inaction following Hardage's October 2000 complaint, Hardage raised a triable issue of fact regarding the reasonableness of CBS's response to his earlier complaints to Patty Dean. Hardage testified that he complained to Dean "numerous times" about Sparks' unwanted sexual advances and that Dean personally observed Sparks' harassment. He also testified that Dean responded to Hardage's complaints by suggesting, "Why don't you just do it and get it over with. It may put her in a better mood." This piece of evidence alone is sufficient to establish a genuine factual dispute as to whether CBS exercised reasonable care in responding to Hardage's complaint. It is difficult to imagine how any reasonable juror could conclude that an employer who suggests that the complainant have sex with a harassing supervisor has

acted reasonably to end the harassment. In concluding that Dean was not on notice of Sparks' harassment and that "[t]aken in context, Dean did not unreasonably fail to report the incident to CBS management, thereby triggering CBS's duty to remedy the situation promptly," Maj. op. at 1187, the majority improperly credits CBS's account and fails to draw all inferences in favor of Hardage by dismissing his claims as "minimal and vague." *Id.* at 18.

2. Whether Hardage Unreasonably Failed to Take Advantage of Corrective Opportunities

As noted above, the existence of a genuine factual dispute regarding *either* prong of the affirmative defense precludes summary judgment in favor of CBS. Because a reasonable jury could find that CBS failed to exercise reasonable care, Hardage is entitled to a trial even if CBS could establish as a matter of law that Hardage unreasonably failed to take advantage of CBS's corrective opportunities. *See Nichols*, 256 F.3d at 877. Nonetheless, it is clear that on this record, a reasonable jury could find for Hardage on this second element as well.

In *Faragher*, the Supreme Court held that harassment victims have "a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of [Title VII]." 524 U.S. at 806, 118 S.Ct. 2275 (internal quotation marks omitted). The "burden [is] squarely on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce harm." *Penn. State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 2354, 159 L.Ed.2d 204 (2004).

> [W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to

> avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Faragher, 524 U.S. at 807-08, 118 S.Ct. 2275. An employer who exercised reasonable care will not be liable "if the aggrieved employee could have avoided all of the actionable harm. . . . [I]f the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages." EEOC Enforcement Guidance § V.D.

Here, the majority concludes as a matter of law that Hardage unreasonably failed to take advantage of CBS's corrective opportunities because "his first complaint to Dean that he has identified with specificity" was not until about six months after Sparks' harassment began. Maj. op. at 1188. In so holding, the majority fails to view the facts in the light most favorable to Hardage. Hardage testified that he reported Sparks' harassing conduct to Dean on "numerous occasions" and told her, "I don't want to be alone with her." He also testified that Dean personally observed Sparks' harassing behavior, and that in response to Hardage's complaints about Sparks' unwanted sexual advances, Dean suggested that he "just do it and get it over with." Viewing the evidence in the light most favorable to Hardage, a reasonable jury could find that Hardage did not unreasonably delay in reporting Sparks' harassment. Unlike in *Kohler*, where the victim *never* complained about her supervisor's harassment, 244 F.3d at 1181, here, Hardage repeatedly complained about Sparks' behavior.

Moreover, even if Hardage had not complained until October 2000, such a delay could not be deemed unreasonable as a matter of law. As the EEOC Enforcement Guidance explains, "An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. . . . An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resort to the complaint process." EEOC Enforcement Guidance § V.D.1. Here, Hardage testified that the incident in October 2000 was "over the line" and that he went into Dean's office the very next day and told her, "Last night, things went way too far." He explained in his deposition, "When it spilled over to where it affects the team that reports directly to me that I'm responsible for – that's – you know, . . . I felt that it was detrimental, over the line, uncalled for."[4] Finally, even if Hardage's delay in reporting the harassment can be viewed as unreasonable in light of the circumstances, this is a matter for a jury to decide.

The majority also concludes that Hardage's claim fails as a matter of law because "[i]n addition to waiting half a year to make a complaint, when Hardage finally made his complaint he specifically asked the company not to investigate it." Maj. op. at 1188. The majority omits, however, that Hardage opted to handle the matter himself only *after* Falcone provided him with the aforementioned legally inadequate response options. Under these circumstances,

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[4] Notably, the incident in October 2000 is the only incident of harassment that CBS characterizes as "work related." If this is correct, then Hardage could not be deemed unreasonable in failing to report Sparks' earlier conduct to CBS.

it can hardly be said that Hardage's decision to deal with Sparks' sexually harassing actions himself is per se unreasonable in light of his other options that were "do absolutely nothing" or have Falcone, who promised not to take any disciplinary actions against Sparks, "very nicely talk with her . . . and ask [her] to please, let's just lay back on this a little bit."

In sum, Hardage complained numerous times to his immediate supervisor, who personally observed the harassing behavior, yet she ignored his concerns and even suggested that Hardage sleep with Sparks "to put her in a better mood." Moreover, it is undisputed that Hardage formally complained the day after the incident in October 2000, when he felt "things went way too far." Contrary to the majority's conclusion, CBS has not established as a matter of law that Hardage unreasonably failed to take advantage of its corrective opportunities.

* * *

An employer who is on notice of alleged harassment has a duty to adequately investigate and take prompt corrective action reasonably calculated to end the harassing behavior. Despite having notice of Sparks' unwanted sexual advances, CBS did nothing. Accordingly, I would reverse the grant of summary judgment and remand for a trial.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUGH HARDAGE, Plaintiff, v. CBS BROADCASTING INC., VIACOM TELEVISION STATIONS, INC., VIACOM BROADCASTING OF SEATTLE, INC., and KATHY SPARKS, Defendants.	CASE NO. C02-1303C ORDER

This matter comes before the Court on the parties' several cross-motions for summary judgment. Plaintiff moves for summary judgment dismissing Defendants' certain affirmative defenses (Dkt. No. 29). Plaintiff also requests summary judgment in his favor on the issue of Defendants CBS Broadcasting, Inc., Viacom Television Stations, Inc., and Viacom Broadcasting of Seattle, Inc.'s (hereinafter collectively called "CBS") vicarious liability (Dkt. No. 16). Defendants CBS move for summary judgment dismissing all Plaintiff's claims (Dkt. No. 33). In addition, Defendant Kathy Sparks has filed a separate motion for summary judgment with respect to all of Plaintiff's claims asserted against her as an individual (Dkt. No. 34).

The Court has considered the papers submitted by the parties and determined that oral argument is not necessary. For the reasons explained below, the Court GRANTS Defendants CBS' motion for summary judgment. The Court also GRANTS in part Defendant Sparks' motions for

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summary judgment. The Court DENIES the remaining summary judgment motions as moot.

I. BACKGROUND: THE FACTS AND ALLEGATIONS

Plaintiff Hugh Hardage ("Hardage") seeks to hold CBS, his former employer, and Kathy Sparks ("Sparks"), a former general manager at CBS, liable for sex discrimination, retaliation, and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Washington Law Against Discrimination ("WLAD"), Rev. Wash. Code § 49.60. Specifically, Hardage alleges that Sparks' "hostile, intimidating, and unwelcome comments and sexual advances to [him] . . . created a hostile work environment for Hardage based upon his gender." (Pl.'s Compl. ¶ 3.3.) Hardage further alleges that CBS "subject[ed] [him] to unfair criticism and greater scrutiny of his work because of his opposition to Sparks' unlawful and discriminatory conduct," and then constructively discharged him "by deliberately making working conditions intolerable to him. . . ." (Id. at ¶ 4.2.) Hardage bases his claims on the following facts, the majority of which are undisputed.

In July of 1998, Hardage assumed a position of account executive at KSTW-TV, a local TV broadcast station.[1] He was primarily responsible for sales of advertising. Hardage's immediate supervisor throughout the entire term of his employment with KSTW was Patty Dean, the station's general sales manager. Dean reported

[1] KSTW's parent company is Viacom, Inc. The station is currently managed by CBS Broadcasting, Inc., a subsidiary of Viacom, Inc.

directly to Sparks, the then vice president/general manager of KSTW and Hardage's alleged harasser. Until approximately one month before Hardage's resignation in August of 2001, he worked in the station's Seattle sales office, whereas Sparks worked in the Tacoma management office. In July 2001, both offices were combined into a single office in Renton, Washington. Prior to the merger of the Seattle and Tacoma offices, Hardage and Sparks saw each other at most a few times per week during the company executives' meetings or at occasional social gatherings.

In February of 2000, after Sparks had joined the station, Hardage was promoted to the position of local sales manager. Together with another local sales manager, Nadene Stauffer, he supervised a team of ten to fifteen account executives. Upon his promotion, Hardage continued to report to Dean. He remained in the position of local sales manager until August 31, 2001, when he handed Dean his letter of resignation.

Hardage characterizes himself as a "flirtatious person by nature." (*Id.* at 179.) At a deposition, Hardage testified that before Sparks started to make unwelcome sexual advances to him, he and Sparks would often engage in "playful banter" and generally had "a relationship that was friendly in nature."[2] (Loppnow Decl. Ex. 2 at 210-11.)

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[2] The friendly nature of the relationship between Hardage and Sparks is best illustrated by Hardage's choice of words in an e-mail message that Hardage sent to Sparks and Dean approximately three months after his promotion. The message reads as follows:

> Being that it's that evaluation time of year, I wanted to give you both my trickle-up effect performance appraisal. I am extremely grateful and fortunate you annointed [sic] me Local Sales Manager of KSTW Television. I have the luxury of having two of the

(Continued on following page)

On a few occasions Hardage called Sparks "Sparkalicious," both in person and in an e-mail message. (*Id.* at 190-81.) In addition, Hardage sporadically referred to Sparks as Ms. Sparky. (*Id.* at 182.) He admits that he also might have called her "the Baskin Robbins 32d flavor." (*Id.* at 181.)

Yet, Hardage claims that he never flirted with Sparks and that it was Sparks who flirted with him both at work and outside work. He alleges that Sparks made numerous sexual advances to him, which he consistently refused. Hardage points out that during Sparks' visits to the station's Seattle office she would frequently comment on Hardage's personal life. Hardage, however, can recall only one harassing statement at work, in which she said "you need somebody that's older and more stable that can take care of you." (Loppnow Decl. Ex. 2 at 225.) In addition, Hardage's subordinate employee and friend Leo Elbert testified at a deposition that when Sparks was visiting the station's Seattle office she "camped out" in Hardage's office and behaved in a flirtatious manner, (Kilbreath Decl. Ex. 5 at 16-17.) According to Elbert, when Sparks was in Hardage's office, she would "kick back in his chair and sometimes have her feet up on his desk. . . . " (*Id.* at 17.) Elbert did not specify any other sexually suspect actions of

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best mentors I've encountered in my broadcast career. You are both a wealth of knowledge, enthusiasm, class etc . . . I'll stop now so I don't make you nauseated.

Happier than hell to be here.

Hugh

P.S. – Last night is a perfect example of what I'm preaching about.

(Loppnow Decl. Ex. 7.)

Sparks, but noted that when talking to Hardage, she would smile and giggle in an overtly flirtatious manner. (*See id.*)

The crux of Hardage's sexual harassment allegations lies in Sparks' behavior outside work. The parties agree that her questionable conduct is limited to the following five social gatherings, four of which were not work-related.

Episode One: The 2000 Easter Festivities

On Easter Sunday of 2000, Hardage, Sparks, Dean, her husband, and a few other people met at the Sorrento Hotel in Seattle for the Easter brunch.[3] During the brunch, each of them consumed a couple of alcoholic drinks. After the brunch, the group decided to relocate to a sports bar, Jillian's, to play games and have a few more drinks. Hardage drove Sparks to Jillian's in her car. The rest of the group used their own cars to get to the bar.

At Jillian's, Hardage had another couple of cocktails and Sparks had two or three beers. There, Sparks made a few direct attempts to work her charm on Hardage. While Hardage was playing air hockey, Sparks put her hands above the hockey table and asked Hardage whether he liked them. That move did not amuse Hardage. Relentless, Sparks put her foot on the edge of the hockey table and asked Hardage if he thought that her foot was pretty. Not having given her the desired answer, Hardage left the

[3] CBS asserts that Hardage invited Sparks to the Easter brunch. Hardage does not specifically recall doing that, (*See* Loppnow Decl. Ex. 2 at 210.) At the same time he testified that "it may have been [he] who picked up the phone to ask her to come" because "there would have been no reason for [him] not to." (*Id.*)

hockey table and started a skateboard-simulator game. Wanting to get Hardage's attention, Sparks got up on the skateboard behind Hardage, put her arms around his waist and said that he had a "cute ass." (Loppnow Decl. Ex. 2 at 216.) At that time Hardage did not tell Sparks that her behavior was inappropriate or made him feel uncomfortable.

Playing games at Jillian's did not exhaust the group's need to socialize and, at either Hardage's or another individual's suggestion, they went for dinner to the Paragon restaurant. Hardage testified that he might have driven Sparks in her car to the Paragon. (Loppnow Decl. Ex. 2 at 219.) At the restaurant, Hardage and Sparks sat across the table from each other. Sparks continued to consume alcoholic drinks and became visibly intoxicated. While the others had a casual dinner conversation, Sparks slid under the table, and allegedly put her foot in Hardage's crotch.[4] By the end of the dinner, someone suggested that Sparks was too drunk to drive home. She agreed and asked Hardage if she could stay at his apartment. After Hardage's categorical elimination of this option, Sparks left the restaurant and drove home in her car.

Episode Two: The Happy Hour at The Icon Grill

Two days after the Easter incident Sparks called Hardage and invited him to the Icon Grill restaurant for an after-work drink. When Hardage came to the restaurant

[4] Sparks denies putting her foot in Hardage's crotch. She explains though that she might have put her foot on the booth cushion where Hardage was sitting as a result of her accidentally sliding underneath the table caused by the booth cushion's slippery surface and the fact that she was wearing "slippery pants." (Kilbreath Decl. Ex. 3 at 67.)

Sparks allegedly told him that since the Easter night she "hadn't been able to sleep . . . and when she'd sleep, she was having orgasms in her sleep." (Loppnow Decl. Ex. 2 at 176.) She asked Hardage if he felt the same way about her. Hardage replied that he was not ready for a relationship with Sparks because he thought that it could damage his career as a manager and because he was not committed to anybody in his life. They talked in a friendly tone for another few minutes before each of them left the Icon Grill. As Hardage testified at his deposition, during that remaining part of their meeting Sparks asked him in a snide manner not to forget "who got [him] to where [he] [was]." (*Id.* at 177.)

Episode Three: The Flight to Texas

In August 2000, Hardage and Sparks each decided to travel to Texas to visit their respective families. Having learned of Hardage's flight information, Sparks booked the same flight for herself. On the airplane, Sparks and Hardage sat next to each other. Hardage testified that on the flight Sparks took her shoe off and started rubbing her foot on his leg. Then, while Hardage and Sparks were talking about life and relationship between sexes, Sparks put her hand on Hardage's back and "rubbed [it] in a kind of weird manner." (Loppnow Decl. Ex. 2 at 231.) Shortly thereafter, Sparks ordered herself and Hardage drinks and called Hardage her boyfriend in front of a flight attendant. As she was consuming her Bloody Mary, Sparks allegedly made explicit sexual advances to Hardage. According to Hardage, she offered him oral sex that would make him forget the woman he was dating at that time. (*Id.* at 233.) She also said, in very direct and unequivocal language, that one sexual intercourse with her would be life-altering

for Hardage. (*Id.*) Hardage again assured her that nothing physical was going to happen between them, which concluded their conversation.

Episode Four: The Baseball Game

The parties agree that this was the only episode of the alleged physical harassment that partially occurred in a work-related setting. In October 2000, Hardage and Sparks took the station's clients to a baseball game in Seattle. At the stadium, Hardage and Sparks sat next to each other. Because it was raining, Sparks was wearing a poncho. Hardage claims that shortly after the game had begun, Sparks "again started the leg-rubbing thing with her foot." (Loppnow Decl. Ex. 2 at 241.) Conscious of what she was doing, Hardage told her "Kathy, cut it out, you know, we got clients sitting next to us, it's inappropriate." (*Id.*) When the rain stopped, Sparks took off her poncho, which dropped across her and Hardage's laps. Sparks then allegedly slid her hand underneath the poncho and reached for Hardage's crotch. She took her hand back after Hardage stopped her by saying "Kathy, cut it out." (*Id.*) She did not resume her attempts to touch Hardage during the rest of the game.

After the game, Hardage invited Sparks to join him and his friends for drinks at the Pesos bar. Sparks accepted the invitation. At Pesos, Hardage met his several female friends who hugged him in front of Sparks. As he was talking to one of them at a table in the corner of the bar, Sparks glared at them with a "piercing stare." (Loppnow Decl. Ex. 2 at 244.) When Hardage came back to the table where Sparks was sitting, she allegedly asked him, "Who haven't you f----d in here?" (*Id.* at 246.) Hardage

replied, "I haven't f----d anybody in here . . . but hopefully she is next," and pointed at the woman sitting next to him. (*Id.*) Sparks then requested that Hardage immediately take her back to her car, which he did. On the way to her car, Sparks allegedly shouted obscenities addressed to Hardage.

On the next day Hardage went to Dean, his supervisor, and told her that Sparks had behaved inappropriately at Pesos in front of some members of his sales team. He did not mention any alleged instances of physical touching. However, he told Dean that he wanted to file a formal complaint for sexual harassment against Sparks.[5] Dean immediately passed Hardage's concerns to Ray Rajewski, the company's executive vice president. Rajewski promptly called Hardage and informed him that Paul Falcone, the company's human resources representative, would contact Hardage shortly regarding the harassment matter. Falcone contacted Hardage as soon as the afternoon of that same day.

Approximately one week later Falcone flew to Seattle, and Hardage and Falcone met in person to discuss Hardage's complaint. Hardage explained to Falcone that Sparks had apparently developed intimate feelings for Hardage and that since she was the general manager of the station he felt awkward. When Falcone specifically asked Hardage whether Sparks had inappropriately touched him in a way that would interfere with his job, Hardage replied in the

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[5] CBS had a policy of prevention of sexual harassment which gave the offended employees several options of reporting the harassing incidents to the company's human resources department. As a supervisor of more than ten employees, Hardage was closely familiar with the policy. (*See* Loppnow Decl. Ex. 2 at 66-70.)

negative. He merely characterized Sparks' behavior as unwanted sexual advances that he had rejected. Finally, although Falcone firmly offered Hardage the option of resolving the problem by a formal complaint procedure, Hardage assured Falcone that raising the situation to that level was not necessary and that he needed no involvement of the company's human resources department at that time.

When Falcone called Hardage approximately two weeks after their meeting and again inquired whether Hardage wanted to pursue the complaint against Sparks, Hardage again responded in the negative and confirmed that he did not want the complaint to go forward. He then added, "If anything changes on my side, I'll be sure and give you a call." (Loppnow Decl. Ex. 4 at 50.) Since then, Hardage has never talked to Falcone or any other person from the company's human resources department regarding his complaint against Sparks. As Hardage testified at the deposition, after he talked to Falcone, "[Sparks'] behavior had ceased and desist [*sic*] from a sexual advance standpoint, which was nice."[6] (Loppnow Decl. Ex. 2 at 31.) Yet, Hardage now claims that there was another instance of harassment outside of work which occurred six months later, in March 2001.

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[6] This statement pertains to a time period immediately following the last alleged episode of harassment discussed below.

Episode Five: The Dinner at Kingfish Café

In March 2001, Hardage invited Sparks and her mother for dinner at the Kingfish Café in Seattle.[7] As they waited outside the restaurant, Sparks allegedly began rubbing Hardage's chest and back in her mother's presence. She commented on her actions as "Oops, sexual harassment." (Loppnow Decl. Ex. 2 at 18.) A few minutes after, when they got inside the cafe, Sparks started to rub her leg against Hardage's leg. Again, she followed up her action with a remark "Oops, sexual harassment." (*Id.*) In response, Hardage confided to Sparks that he had in fact filed a sexual harassment complaint against her. At first, she did not react in any negative way, but according to Hardage's allegations, when her mother stepped away from the table, Sparks said, "I . . . knew I had to fear you, mother----r." (*Id.* at 20.) Nevertheless, the dinner ended peacefully with Hardage giving Sparks a hug goodnight.

From March 2001 to his resignation on August 31, 2001, Hardage continued to work for KSTW as a local sales manager supervising ten to fifteen employees. During that time period Hardage experienced no other sexually provocative incidents involving Sparks except her alleged comments on his dating choices. He also asserts that Sparks' assistant, Diane Goins, had called him several times and warned him to "watch his ass" with respect to his work-related expense reports and call sheets. (Loopnow Decl. Ex. 2 at 38.) Hardage's friend, Christa Goins, also testified that some time after the 2000 Easter brunch incident she heard from her sister Diane

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[7] Hardage now claims that his supervisor Dean forced him to make the invitation. (*See* Pl.'s Opp'n at 9.)

that Diane heard Sparks bragging that she could "f---k [Hardage] and fire him the next day and there was nothing he could do about it." (Kilbreath Decl. Ex. 8 at 13.) Apparently, neither of Sparks' intended actions had materialized.

During his tenure as a local sales manager Hardage suffered no demotion, change in job title, or decrease in salary or benefits despite the decrease in quality of his performance towards the end of 2001.[8] In the spring of 2001, the advertising market in Seattle started to abruptly plummet. The sales situation at KSTW was dismal and Hardage's team had repeatedly failed to make its sales goals. As Dean indicated in a memorandum addressed to Stauffer, Hardage, and Mitch Boyle, "KSTW Local Sales [was] being outpaced in 2nd quarter of 2001. [KSTW] [was] being outsold, out prepared and out manned in this market" (Loppnow Decl. Ex. 10.) In fact, in the second quarter of 2001, KSTW lost 11.5% of its local sales market share. (Loppnow Decl. Ex. 11.) In another memorandum dated July 30, 2001 and addressed to Hardage and Stauffer, Dean indicated that the then current revenue projections for August-September 2001 had been reduced by $130,000.00 and the total decrease in revenue projections equaled $733,000.00. (Loppnow Decl. Ex. 13.)

Dean found those revenue projections unacceptable and requested that both Hardage and Stauffer take a series of actions to improve the company's advertising sales situation. However, the only action Hardage took after receiving Dean's admonitions was to hand her his

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[8] To the contrary, Hardage received a discretionary bonus in 2001. (Loppnow Decl. Ex. 2 at 97-98.)

resignation letter on August 31, 2001. As he later admitted during his deposition, at that time, he felt that the financial situation at the station and the market generally were so tense that he "didn't have anything else to give." (Loppnow Decl. Ex. 2 at 159.) "[H]e was deflated to the point that . . . was the end of [his] rope." (*Id.* at 160.) In Hardage's own words, "life's too short to have to work under that duress." (*Id.* at 161.)

II. ANALYSIS

A. Legal Standard For Summary Judgment

Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, the court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986).

Initially, it is the moving party's burden to establish that there is no genuine issue of material fact. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Once the movant has met its initial burden, the burden then shifts to the non-moving party to show the court that there is in fact a genuine issue for trial. *Id.* at 250. "The nonmoving party must identify for the court specific facts, supported by evidence, affidavits, depositions, sworn or certified copies of documents, or other material contemplated by Rule 56(e), which articulate and illustrate the presence of a genuine issue requiring trial."

11 James W. Moore et al., *Moore's Federal Practice and Procedure* § 56.13(2) (3d ed. 1997). The nonmoving party, however, may not rely on inadmissible hearsay evidence in its effort to defeat the summary judgment motion. *See Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. 1980).

B. CBS' Motion For Summary Judgment

CBS argues that Hardage's sexual harassment claims under both federal and state statutes are not viable because Sparks' alleged isolated episodes of sexual advances to Hardage were not sufficiently severe or pervasive to create a hostile work environment for him. Alternatively, CBS maintains that Hardage's sexual harassment claims may not survive summary judgment because of the undisputed evidence that Hardage had consciously failed to take advantage of the company's sexual harassment prevention mechanisms. In addition, it is the position of CBS that Hardage's retaliation and constructive discharge claims must fail as a matter of law as not supported by evidence that Hardage suffered any adverse employment action while he worked at CBS.

The Court finds that evidence of CBS' attempts to cure Sparks' allegedly harassing behavior and Hardage's failure to properly utilize CBS' anti-harassment policy to his advantage effectively bars Hardage's sexual harassment claims against CBS.[9] The Court also finds that Hardage

[9] Because this finding is dispositive of Hardage's sexual harassment claims against CBS, the Court does not reach the issue of whether Sparks' conduct at work and outside work was sufficiently severe or pervasive to result in a hostile work environment for Hardage.

has failed to produce evidence that would enable a reasonable juror to find that Hardage's working conditions were sufficiently intolerable and discriminatory to construe his voluntary termination of the employment with CBS as constructive discharge.

1. Hardage's Claims For Sexual Harassment

Title VII of the 1964 Civil Rights Act prohibits an employer from "discriminat[ing] against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of . . . sex," 42 U.S.C. § 2000e-2(a)(1).[10] Discrimination on the basis of sex may take the form of sexual harassment that reveals itself in "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting the EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1985)) (brackets in original).

To be actionable, unwelcome sexual advances and comments need not necessarily affect the terms and conditions of employment in a traditional economic or contractual sense. The offended employee may have a valid Title VII sexual harassment claim against the employer if "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to . . . create an abusive working environment.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21

[10] Hardage asserts sexual harassment and retaliation claims under both federal and Washington state law. Hardage's WLAD claim may be adjudicated in the same breath as her Title VII claim, since "decisions interpreting [Title VII] are persuasive authority for the construction of [WLAD]." *Xieng v. People's Nat'l Bank*, 844 P.2d 389, 392 (Wash. 1993).

(1993) (quoting *Meritor Sav. Bank*, 477 U.S. at 65, 67). Federal courts have uniformly referred to such sexual harassment claims as hostile work environment claims. *See, e.g., Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1109-1110 (9th Cir. 2000).

An employer is vicariously liable for the severe or pervasive harassing behavior of a supervisor[11] towards his or her subordinate unless the employer proves that it has exercised reasonable care to prevent the harassment. As the United States Supreme Court has recently held in two companion cases, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Ellerth, 524 U.S. 742, 765 (1998); *Faragher*, 524 U.S. 775, 807-08 (1998). *The Ellerth/Faragher* defense "stand[s] for the principle that an employer may escape liability for

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[11] Hardage claims that Sparks was his "immediate (or successively higher) supervisor." (Pl.'s Opp'n at 18.)

harassment by certain of its employees when it undertakes appropriate steps to remedy the situation. The defense also recognizes that a harassed employee bears some responsibility to avoid or mitigate workplace hostility." *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001).

(a) Tangible Employment Action

Consistent with the *Ellerth / Faragher* mandate, before proceeding to analyze whether CBS has met its burden of proof on the "reasonable care" affirmative defense, the Court must first find that Hardage suffered no tangible employment action as a result of Sparks' alleged harassing conduct. The Ninth Circuit has interpreted the term "tangible employment action" as used in *Ellerth* and *Faragher*, by looking into the EEOC regulations which defined "adverse employment action" as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[12] *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (quoting EEOC Compliance Manual, § 8, "Retaliation," ¶ 8008 (1998)). Reading that definition broadly, the court concluded that tangible employment actions include not only discharge and demotion, but a variety of other actions that may not cause adverse economic consequences, such as lateral

[12] In *Meritor Savings Bank*, the United States Supreme Court authorized federal courts to use EEOC pertinent regulations as a persuasive authority in Title VII sex discrimination cases because those regulations " 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' " 477 U.S. at 65.

transfers, unfavorable job references, change in work schedules, and reducing the work load. *See id.* at 1241-44. However, in *Kohler v. Inter-Tel Technologies*, decided subsequent to *Henderson*, the court cautioned that "'a tangible employment action in most cases inflicts direct economic harm.'" 244 F.3d 1167, 1179 (9th Cir. 2001) (quoting *Ellerth*, 524 U.S. at 762).

In addition, the Ninth Circuit has clearly established that an unfavorable employment action becomes adverse or tangible in the context of a sexual harassment claim only if the plaintiff establishes a causal link between the behavior protected by Title VII and the employer's action. *See Henderson*, 217 F.3d at 1243. In other words, a proof of an adverse employment action requires that the plaintiff demonstrate (1) that she acted to protect her Title VII rights, (2) that an adverse employment action was taken against her, and (3) that a causal link exists between those two events. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994). Thus, under the Ninth Circuit case law, a court dealing with the issue of tangible adverse employment actions in the context of Title VII discrimination claims should scrutinize the employer's motivation underlying the adverse action, rather than the action's objective characteristics. *See, e.g., Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 877 (9th Cir. 2001) (holding that termination of a complainant, though temporally surrounded by events relating to the complainant's harassment complaints, was not an adverse employment action because he was fired for leaving work in the middle of his shift after a heated argument with an assistant manager).

A temporal proximity between the employee's protected activity and the employer's unfavorable action may

serve as evidence of the action's retaliatory nature or a lack of it. *See Henderson*, 217 F.3d at 1244 (citation omitted). For example, in *Montero v. AGCO Corp.*, the Ninth Circuit held that the plaintiff, who claimed that she was constructively discharged in retaliation for complaining about sexual harassment, failed to demonstrate a tangible adverse employment action because she left her employer three to four months after the harassing behavior had ceased. 192 F.3d 856, 861 (9th Cir. 1999).

Hardage claims that after he had informally complained to Dean and Falcone about Sparks' unwelcome sexual advances, he started to "experience[] several adverse employment actions" in the form of "the increased hostility directed towards him. . . ." (Pl.'s Opp'n at 23.) That hostility allegedly included snide remarks such as "your numbers [*sic*] up," "it's not going to be me that loses my job, it's going to be you" and "watch your ass," as well as placing Hardage on a thirty day probation and "other disparate treatment." (*Id.*) Hardage concludes that "his rejection of this hostile and abusive work environment [] ultimately led to [his] constructive discharge." (*Id.* at 24.)

Having considered the evidence submitted by the parties, the Court is unpersuaded by Hardage's arguments. First, Hardage admits that subsequent to his informal complaint about Sparks' "loose" behavior and during the remainder of his employment with CBS, he suffered no demotion, change in job title, or decrease in salary or benefits. Second, as discussed below, CBS did not constructively discharge Hardage in retaliation for his rejection of Sparks' sexual advances because Hardage left the company more than five months after Sparks had engaged in the last alleged episode of harassment during the dinner at the Kingfish Café. *See Montero*, 192 F.3d at

861. In fact, Hardage testified that after that dinner he was under the impression that "[Sparks'] behavior had ceased and desist [*sic*] from a sexual advance standpoint, which was nice." (Loppnow Decl Ex. 2 at 31.)

In addition, Hardage's assertion that he was placed on a thirty-day probation as a result of his resistance to Sparks' harassing conduct has no evidentiary support. The memorandum that Dean sent to Hardage specifically addressed concrete deficiencies in Hardage's performance and requested that he improve the procedures within the scope of his work duties. (*See* Loppnow Decl. Ex. 12.) It is undisputed that at the time Dean authored the memorandum, Hardage's performance had in fact decreased and his sales team was unable to meet its goals. Moreover, Hardage admitted to the incident of insubordination that prompted Dean's memorandum. (*See* Loppnow Decl. Ex. 2 at 129-30.) In sum, there is no evidence linking this merely admonishing memorandum to Hardage's rejection of Sparks' requests for sexual favors. Consequently, the memorandum does not constitute adverse tangible employment action in the context of Hardage's claim for sexual harassment. *See Henderson*, 217 F.3d at 1243.

Likewise, Sparks' alleged snide remarks and threats of termination addressed to Hardage do not constitute adverse employment action. Aside from the substance of those comments, they may amount to inadmissible hearsay that Hardage may not rely on to create a material issue of fact necessary to defeat the summary judgment. *See Blair Foods*, 610 F.2d at 667. But even if admissible for state of mind purposes, those comments are of no help to Hardage's adverse employment action argument because Hardage failed to show a causal link between the comments and his rejection of Sparks' sexual advances

which, he admits, had ceased several months before the snide comments were made. In addition, it is undisputed that Sparks' alleged indirect threats to fire Hardage never became a concrete action and Hardage's conditions of employment remained unchanged until he delivered his resignation letter to Dean. Overall, the Court concludes that Sparks' alleged harassing behavior did not culminate in any adverse tangible employment action against Hardage. Accordingly, CBS is entitled to assert the *Ellerth/Faragher* affirmative defense against Hardage's claim for CBS's vicarious liability.

(b) Application of the Ellerth/Faragher Affirmative Defense

As noted above, the *Ellerth/Faragher* defense requires both an employer and the employee to exercise reasonable care in preventing and eliminating the work place sexual harassment. The first prong of the defense requires CBS to show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765. Proof of such reasonable care normally includes (1) evidence that the employer has promulgated an anti-harassment policy establishing complaint procedures, and (2) evidence that the employer has in fact acted promptly to redress the harassed employee's complaint. *See, e.g., Kohler*, 244 F.3d at 1180-81 (citing *Ellerth*, 524 U.S. at 765).

It is undisputed that at the time when Hardage worked at CBS, the company had a policy aimed at prevention and elimination of sexual harassment. It is also undisputed that as a supervisor of more than ten employees Hardage was closely familiar with the policy's preventative and remedial

procedures. (*See* Loppnow Dec. Ex. 2 at 66-70.) Hardage admitted that CBS trained him on the anti-harassment procedures, in part by requiring him to watch a videotape depicting various incidents of sexual harassment. (*Id.* at 66.) Hardage also testified that as a supervisor he had a duty to report all episodes of sexual harassment to CBS' human resources department. (*Id.*) In addition, he admitted that CBS unequivocally prohibited sexual harassment. (*Id.* at 66-67.)

Ample evidence in the record leads the Court to conclude that CBS addressed Hardage's informal complaint for sexual harassment in a prompt and reasonable manner. As soon as the afternoon of the same day when Hardage complained to his supervisor Dean about Sparks' inappropriate behavior at Pesos, Hardage was contacted by Falcone, CBS' human resources representative. Approximately one week later, Falcone flew to Seattle to meet with Hardage and discuss Hardage's grievances. It is undisputed that Falcone had interviewed Hardage with respect to the latter's informal complaint to Dean. It is also undisputed that during that interview Hardage refused to pursue a formal complaint procedure against Sparks. At the conclusion of the interview, Falcone offered Hardage his prompt assistance with Hardage's sexual harassment claim at any time. In addition, Falcone called Hardage approximately two weeks after their meeting and again inquired whether Hardage wanted to pursue the complaint against Sparks. These facts indicate that CBS acted reasonably to investigate and remedy the harassing incidents alleged by Hardage.

Hardage does not dispute the company's prompt actions upon his conversation with Dean. Instead, he argues that because Dean, his supervisor, and Elbert, his

subordinate employee, had witnessed the alleged harassing episodes, CBS "had direct knowledge of the harassing conduct." (Pl's Opp'n at 19.) Despite that knowledge, he continues, the company "[f]ailed to prevent and correct [that] behavior." (*Id.* at 20.) Hardage's arguments, however, find no evidentiary support. All of the five alleged episodes of Sparks' unwelcome advances that are crucial to Hardage's claim of severe and pervasive harassment occurred outside work. Accordingly, Dean was physically unable to observe those incidents. The fact that Dean allegedly witnessed one of them at the Paragon restaurant, does not impute to CBS the knowledge of the ongoing harassment because the incident took place in a social setting where Dean acted as Hardage's friend as opposed to a supervisor and representative of CBS. In addition, Hardage testified that he never told Dean about the specifics of Sparks' allegedly harassing behavior.

Likewise, Hardage's argument that Dean observed Sparks' inappropriate sexual advances at work contradicts the evidence in the record. First, until July of 2001, Hardage and Sparks worked in different offices. Thus, during that time period, they saw each other in the work environment at most twice a week during the company meetings. And during a period of approximately one month when Hardage and Sparks did work in the same office, Dean could not observe Sparks' harassing behavior because, per Hardage's admission, it "had ceased and desist [*sic*] from a sexual advance standpoint" several months before. (*See* Loppnow Decl. Ex. 2 at 31.) Second, Sparks' comments addressed to Hardage such as "you need somebody that's older and more stable that can take care of you" were not capable of putting Dean on notice of ongoing harassment because they were a part of "playful banter"

between Hardage and Sparks. In fact, the logic that Hardage now offers would have required Dean to suspect Hardage of harassing Sparks based on his name-calling such as "Sparkalicious," "Ms. Sparky," and "Baskin and Robbins 32d flavor."

The Court finds that CBS's efforts to address Hardage's complaint against Sparks were prompt and reasonable under the circumstances.[13] CBS, therefore, has carried the burden of proving the first prong of the *Ellerth/Faragher* defense.

The second prong of the defense requires the employer to prove "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08. In *Kohler v. Inter-Tel Technologies*, the Ninth Circuit held that the employer successfully satisfied the second prong of the *Ellert/Faragher* defense by demonstrating that the complaining employee was aware of the employer's anti-harassment policy but failed to complain about the allegedly harassing behavior of her supervisor.

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[13] In arguing that CBS' remedial measures fell below the standard mandated by *Ellerth* and *Faragher*, Hardage relies on *Nichols v. Azteca Restaurant Enterprises, Inc.*, where the Ninth Circuit held that the employer's failure to investigate the harassed employee's informal complaint precluded the employer from relying on the *Ellerth/Faragher* defense. This reliance is misplaced because the facts in *Nichols* differ significantly from the facts of the case at bar. There, after the employee's complaint, the human resources director suggested that the employee report any future harassing behavior, but took no action as to the episodes of harassment he already knew about. *Nichols*, 256 F.3d at 876. In contrast, Falcone specifically offered to investigate Sparks' alleged past harassing conduct based on Hardage's vague complaint, which option Hardage categorically rejected.

See 244 F.3d at 1181-82. Importantly, the law does not require total employee inaction in order for an employer to succeed on the *Ellerth/Faragher* defense. In fact, CBS only needs to show that Plaintiff's conduct was unreasonable. As the *Ellerth* court explained, "while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing *any* unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Ellerth*, 524 U.S. at 765 (emphasis added).

In this case, although Hardage talked to Dean and Falcone about Sparks' conduct in vague and generic terms, those informal conversations did not amount to a reasonable use of the remedial opportunities available under CBS's anti-harassment policy. Hardage did not disclose to either Dean or Falcone the details of Sparks' alleged unwelcome sexual advances. He only commented that Sparks' behavior was inappropriate and made him feel uncomfortable. Further, Hardage refused to proceed with a formal complaint against Sparks although this avenue was firmly recommended by Falcone. Hardage never complained about Sparks' harassing behavior after his meeting with Falcone. Finally, even after the alleged harassment had started, Hardage made no efforts to avoid Sparks' offensive presence. To the contrary, he continued to willingly socialize with her outside of work. Therefore, CBS successfully satisfied the second prong of the affirmative defense as a matter of law by showing Hardage's unreasonable actions during the period of the alleged harassment.

In sum, Hardage has not offered evidence capable of creating a genuine issue of fact with respect to the sufficiency of CBS' remedial measures and the reasonableness of Hardage's refusal to participate in a complaint procedure against Sparks. Hardage's conclusory allegations, speculations, and argumentative assertions that material facts are in dispute are insufficient to defeat CBS' motion for summary judgment. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994). The Court therefore concludes that as a matter of law, CBS bears no vicarious liability for Sparks' alleged harassment and therefore dismisses Hardage's federal and state law claims for sexual harassment against CBS.

2. Hardage's Claim For Constructive Discharge

To survive CBS's motion for summary judgment on this claim, Hardage must show that "there are triable issues of fact as to whether 'a reasonable person in [his] position would have felt that [he] was forced to quit because of intolerable and discriminatory working conditions.'" *Steiner*, 25 F.3d at 1465. "[C]onstructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become 'sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer.'" *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) (quotation omitted). Consistent with this requirement of the heightened showing of intolerable working conditions, the Ninth Circuit has ruled that no constructive discharge occurs if intolerable and discriminatory working conditions cease

some time before the employee quits his or her job. *See, e.g., Steiner*, 25 F.3d at 1465-66 (holding that the plaintiff failed to establish a claim for constructive discharge where she left her employer two and one-half months after the discriminatory and harassing conduct had ceased); *Montero*, 192 F.3d at 861 (dismissing the plaintiff's constructive discharge claim based on her testimony that the employer's harassing behavior had ceased three to four months before she quit her job).

The evidence submitted by the parties reveals that Hardage's working conditions were clearly not so intolerable and discriminatory that a reasonable person in his position would feel compelled to resign. First, as the Court concluded in Part I.B(1)(a) of this Order, throughout the entire period of his employment with CBS Hardage suffered no tangible adverse employment actions. Second, Hardage testified at his deposition that at least five months prior to his resignation Sparks' allegedly harassing behavior "had ceased and desist [*sic*] from a sexual advance standpoint, which was nice." (Loppnow Decl. Ex. 2 at 31.) Therefore, because Hardage failed to demonstrate that CBS treated him in an intolerable and discriminatory manner at the time of his resignation, Hardage's claim for constructive discharge may not stand as a matter of law.

C. Sparks' Motion For Summary Judgment

Sparks has fled a separate motion for summary judgment requesting that the Court dismiss Hardage's Title VII claims against her as an individual arguing that a manager may not be individually liable under the federal discrimination laws. Sparks also argues that the Court should dismiss Hardage's claims for sexual harassment,

retaliation, and constructive discharge against her as an individual under the Washington Law Against Discrimination because there is no evidence supporting those claims. Hardage agrees that Sparks may not be individually liable under Title VII. (Pl.'s Resp. to Summ. J. at 1.) The Court, therefore, dismisses with prejudice all of Hardage's Title VII claims against Sparks. Nonetheless, Hardage submits that WLAD allows claims against supervising employees, such as Sparks, in their individual capacity. For the following reasons, the Court does not address this argument.

The Court has no independent basis for the subject matter jurisdiction over Hardage's state law claims. From the very inception of this case, the Court exercised supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367(a) because they allegedly arose from the same common nucleus of operative facts as Hardage's Title VII claims. Yet, a federal district court may decline to exercise supplemental jurisdiction over state law claims if the court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). As the Ninth Circuit opined, "in the usual case in which federal-law claims are eliminated before trial, the balance of [the factors of economy, convenience, fairness, and comity] will point toward declining to exercise jurisdiction over the remaining state-law claims." *O'Connor v. Nevada*, 27 F.3d 357, 362-63 (9th Cir. 1994) (brackets in original). In this Order, the Court dismissed all Hardage's Title VII claims against Defendants. Therefore, pursuant to 28 U.S.C. § 1367(c)(3), the Court hereby dismisses without prejudice Hardage's claim against Sparks arising under WLAD.

III. CONCLUSION

The Court hereby GRANTS Defendants CBS Broadcasting, Inc., Viacom Television Stations, Inc., and Viacom Broadcasting of Seattle, Inc.'s motion for summary judgment and dismisses all Plaintiff's claims against CBS with prejudice. The Court also GRANTS Defendant Sparks' motion for summary judgment in part and dismisses Plaintiff's Title VII claims against Sparks with prejudice. The Court declines to exercise subject matter jurisdiction over Plaintiff's claims against Sparks arising under Washington law and dismisses those claims without prejudice. The Court DENIES as moot Plaintiff's motion for summary judgment on the issue of vicarious liability and Plaintiff's motion for partial summary judgment dismissing Defendants' affirmative defenses.

SO ORDERED this 22 day of October, 2003.

/s/ John C. Coughenour
CHIEF UNITED STATES
DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF WASHINGTON

HUGH HARDAGE

v.

CBS BROADCASTING INC., VIACOM TELEVISION STATIONS, INC., VIACOM BROADCASTING OF SEATTLE, INC., AND KATHY SPARKS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CO2-1303C

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that

Defts CBS Broadcasting, Viacom Television Stations and Viacom broadcasting of Seattle's Motion for Summary Judgment is GRANTED and dismisses all plaintiff's claims against CBS with prejudice. Court grants Deft Sparks' Motion for Summary Judgment IN PART and dismisses Plaintiff's Title VII claims against Sparks with prejudice. Court declines to exercise subject matter jurisdiction over Plaintiff's claims against Sparks arising under WA law and dismisses those claims without prejudice. Court DENIES as moot, Plaintiff's Motion for

Summary Judgement of vicarious liability and Motion for Partial Summary Judgment.

December 15, 2003

BRUCE RIFKIN
Clerk
/s/ Linda Simle
By, Deputy Clerk

433 F.3d 672

United States Court of Appeals,
Ninth Circuit.
Hugh HARDAGE, Plaintiff-Appellant,
v.
CBS BROADCASTING INC., a New York Corporation;
Viacom Television Stations Inc.,
a Delaware Corporation;
Viacom Broadcasting of Seattle Inc.,
a Delaware Corporation; Kathy Sparks, an individual,
Defendants-Appellees.
No. 03-35906.

Argued and Submitted May 3, 2005.
Filed Nov. 1, 2005.
Amended Jan. 6, 2006.

Claudia Kilbreath, Short Cressman & Burgess PLLC, Seattle, WA, for the plaintiff-appellant.

Harry J.F. Korrell and Kathryn S. Loppnow, Davis Wright Tremaine LLP, Seattle, WA, for the defendants-appellees.

Appeal from the United States District Court, for the Western District of Washington; John C. Coughenour, Chief Judge, Presiding. D.C. No. CV-02- 01303-JCC.

Before WALLACE, SILVERMAN, and PAEZ, Circuit Judges.

ORDER

The panel opinion filed November 1, 2005, is amended as follows:

Add to end of footnote 1 (p. 14898):

> The dissent also analyzes the potential legal effect of EEOC enforcement guidance. This

> guidance was never cited by Hardage in any of his briefs. "Our circuit has repeatedly admonished that we cannot 'manufacture arguments for an appellant' and therefore we will not consider any claims that were not actually argued in appellant's opening brief." *Indep. Towers v. Washington,* 350 F.3d 925, 929 (9th Cir.2003), *quoting Greenwood v. FAA,* 28 F.3d 971, 977 (9th Cir.1994). For that reason, we will not manufacture an argument on Hardage's behalf and then rule on it in his favor. This argument was waived. *See Greenwood,* 28 F.3d at 977.

The petition for panel rehearing is denied. Judge Paez would grant the petition. The petition for rehearing en banc is pending before this court. No further petitions may be filed.

436 F.3d 1050

United States Court of Appeals,
Ninth Circuit.
Hugh HARDAGE, Plaintiff-Appellant,
v.
CBS BROADCASTING INC., a New York Corporation;
Viacom Television Stations Inc.,
a Delaware Corporation; Viacom Broadcasting
of Seattle Inc., a Delaware Corporation;
Kathy Sparks, an individual, Defendants-Appellees.
No. 03-35906.

Argued and Submitted May 3, 2005.
Filed Nov. 1, 2005.
Amended Jan. 6, 2006.
Second Amendment Feb. 8, 2006.

Claudia Kilbreath, Short Cressman & Burgess PLLC, Seattle, WA, for the plaintiff-appellant.

Harry J.F. Korrell and Kathryn S. Loppnow, Davis Wright Tremaine LLP, Seattle, WA, for the defendants-appellees.

Appeal from the United States District Court for the Western District of Washington; John C. Coughenour, Chief Judge, Presiding. D.C. No. CV-02- 01303-JCC.

Before WALLACE, SILVERMAN, and PAEZ, Circuit Judges.

ORDER

The panel opinion filed January 6, 2006, is amended as follows:

Add as a new paragraph after footnote 1 (slip op. 82):

> There may be circumstances where an employer's "remedial obligation kicks in," *Fuller,* 47

> F.3d at 1528, regardless of the employee's stated wishes. In other words, the mere fact that the employee tells the employer not to take any remedial action may not always relieve that employer of the obligation to do so. *See, e.g., Torres v. Pisano,* 116 F.3d 625, 639 (2d Cir.1997). Here, however, it is uncontested that Hardage did not want Falcone to take further action, and that Hardage's wishes were not insincere or uninformed. Moreover, Hardage did not disclose to Falcone the details of the harassment, so Falcone had no way to know of its severity.

The petition for panel rehearing has been previously denied. Judge Silverman votes to deny the Petition for Rehearing En Banc and Judge Wallace so recommends. Judge Paez would grant the petition. The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

Appellant's Petition for Rehearing En Banc is therefore DENIED. No further petitions may be filed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUGH HARDAGE, Plaintiff-Appellant, V. CBS BROADCASTING INC., a New York Corporation; et al., Defendants-Appellees.	No. 03-35906 D.C. No. CV-02-01303-JCC **JUDGMENT**

Appeal from the United States District Court for the Western District of Washington (Seattle).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 11/01/05

Amended: 02/08/06

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or

other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an

unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any

employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

> **(i)** a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> **(ii)** the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are

not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(*l*) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of

applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws –

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had –

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect

the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to –

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order

described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUGH HARDAGE, Plaintiff, vs. CBS BROADCASTING, INC., a New York corporation; et al., Defendants.	)	NO. CV02-1303C

DEPOSITION UPON ORAL EXAMINATION
OF
HUGH LEE HARDAGE, III
VOLUME I

9:10 a.m.
January 30, 2003
1501 Fourth Avenue, Suite 2600
Seattle, Washington

Michael Mills
Court Reporter

* * *

[17] Another time was at the Kingfish Restaurant, when she – she put her arm around me, the coat around me, and started rubbing my chest. It was cold outside, it was blustery. I didn't have a jacket.

And then she made a sexual harassment comment –

* * *

[18] Q. Okay. And then when did – when was this alleged Kingfish Restaurant incident?

A. I'm not sure exactly the date on that. I would think that that may be – my best guesstimate on that would be around probably March of 2001. It may – it may have been earlier than that, but that's a – that's a guess –

* * *

[19] Q. Okay. And tell me about that conversation.

A. I told her that I wanted to speak to her on a Tuesday morning at a department head meeting and – about – about something.

And she continued to kind of batter me to get it, you know, "Talk me now, you can tell – tell me anything you want to tell me, you can say that in front of" – Mary's her mother's name – "you can say anything you want to in front of Mary."

And I was like, "No, it's just not appropriate. It's not appropriate to do at this time" –

Q. So you –

A. – "I'd like to talk to you Tuesday."

Q. So you were at – at a restaurant with Ms. Sparks and her mother?

A. Correct. Correct. We were in a very noisy back area by the kitchen and rest room, I believe. And it was very hard to hear.

We were at a kind of a long table. And I just leaned over and said, "I want to talk to you about, you know, the

word you just used, 'sexual harassment,' and can we talk Tuesday?"

[20] And she – she wanted to know now. She kept asking, you know, "Tell me now."

And I said, "Well, I – I filed a formal complaint against you about sexual harassment."

She then started kind of talking about business. I believe she was talking about movie business. And it was just kind of a weird scenario, like she went into this mode that wasn't familiar, wasn't anything that was on the line of questioning to our conversation.

Then her mother got to the bathroom, and she said, "I fucking knew I had to fear you, motherfucker."

And that was – that was how the conversation ended.

* * *

And he told me – you know, I told him about that I was uncomfortable, that sexual advances had been made that I were uncomfortable with. I was uncomfortable with the whole situation.

* * *

[24] Q. So you – you told Patty that she – that things had crossed the line at Peso's, or something to that effect?

A. I – I told Patty about her losing her temper and her ignoring Jincey Zeuhlke, who worked for us at the time.

And Leo – Leo had to go with me in the cab to kind of calm her down to make sure that things didn't escalate beyond where they were already, which was over the line.

I did not tell Patty specifics about sexual contact. I was extremely nervous and intimidated by that whole – you know, those whole events that had transpired. It's a scary place to be.

Q. Did you ever tell Patty about any sexual advances or –

A. Yes. Yeah, Patty knew about some sexual advances. In fact, it was – it was kind of a running joke with her of always trying to put us in the same – you know, set us up in situations where we would be together or we would be – you know, we would have the opportunity to be like on a date.

[25] And she would always say, you know, like, "Why don't you just do it and get it over with. It may put her in a better mood." Or "If you do it, I don't want to know; I just don't want to know; don't tell me." Things of that nature.

So she – she knew, on more than one occasion, that I'd asked repeatedly not to be left alone, and had denied going to functions, to cookouts, to a – to a concert at, the Mercer Coliseum with them because I just didn't – I didn't feel comfortable in that environment; I wanted no part of – of being around her alone.

* * *

[27] I called Mr. Falcone back and got misinformation the one time I called him back. He was really the only individual that – you know, he instructed me to kind of talk to him and to let him proceed from there.

I didn't – I didn't share any of the so-called gory details with anybody. I was – you know, I was afraid for – for what may happen with my career.

Q. Didn't Mr. Falcone follow up with you about a week later with a telephone call to say, you know, "How are things going?"

A. He may or may not have. I would not say that he didn't.

If he did, my answer to him would have been that I hadn't had the conversation with her yet, because it took me [28] some four to six weeks, probably, at least, since he came into town, when the setting was right where I felt comfortable,

Ms. Sparks is very well respected. She has a tremendous business acumen, and she's very well respected in that organization. She had a relationship with Ray Rajewski that was extremely tight. And it was kind of a harrowing experience. So I – you know, I kept a lot of stuff under the vest.

Q. Now, you said you – you – you called Mr. Falcone back or left him a message. When was that?

A. I did. I called him and left him a message on his answering machine. And then I called him another time, and they said he was no longer with the company, which caught me completely off guard. I didn't –

Whoever – whoever I spoke with was obviously misinformed, because he was on a medical leave. Because I was completely surprised when, after termination of my employment, that I – I got a call from Mr. Falcone, who made sure that I got overnighted my just compensation.

Q. When did you leave a message on Mr. Falcone's machine; do you recall?

A. I don't know the dates exactly. I don't know the dates. I can't recall at this time.

* * *

[30] Q. So when you called and left a message, you did not hear back from anyone, is that right?

A. That's correct.

Q. Did you call anyone again, after you left that message?

A. I did. And they said he was no longer with the company, which is –

* * *

[163] Did you – did you ever say to anybody at CBS corporate, around the time you left, that your leaving had anything to do with Kathy Sparks or any alleged harassment or retaliation?

A. I did. I did to Paul Falcone, when he called me on the phone.

I had to call him – I didn't know he was with the company. I told you earlier it was a surprise to find that [164] out, when Monty Castellanos told me that I needed to talk to Paul Falcone about my check, because they were withholding my check for some, you know, trip that I went to Dallas on or something, and they were withholding expense checks.

So I called Paul, and he – and I said I was shocked that he was still with the company; I'd been given misinformation. And that's when I found out he was on a medical leave.

And he said, "I'm," you know, "sorry to see you go; what precipitated this?"

And I said, "I just couldn't deal with it anymore, man, Kathy" – I told him on the phone – "Kathy's behavior became more and more intense, and I felt like she was holding – holding it – had me in – had it in for me, and that's why I left."

And he said, "Man, I will have your money overnighted to you. You will have your money tomorrow."

* * *

[187] A. Now for – now back to Paul Falcone.

With Mr. Falcone, I was extremely intimidated, you know, I didn't –

When I went to Patty Dean, and she's like, "Don't worry, you know, I've got this thing handled, you're going to be fine, nothing's going to happen, I'm going to have to call Ray and report this to Ray."

Ray then called me. And then Mr. Falcone came, and we made arrangements to meet. I never went into gory detail with him. Again, I was in uncharted waters. I was nervous as hell. I was talking to a corporate attorney who I had no relationship with.

As I mentioned before, Kathy Sparks's track record spoke for itself before she came to –

Q. Have you ever learned that Mr. Falcone is not an attorney; he's actually just an HR person at –

A. Oh, I didn't know that. I thought he was an attorney.

Q. Okay.

A. I didn't – I didn't realize he was just an HR person; I thought he was like – like a dual – dual – dualing head, like he worked for CBS as an attorney/human [188] resources attorney. I knew he had written many books, or –

Q. Why did you think he was an attorney?

A. I don't know. I don't know. Maybe that was just an assumption I passed. I thought maybe with the – the way he was talked about, you know, when – with his books, the books that he's written and – I – I may have just passed an assumption, or maybe had heard that incorrectly, and –

Q. So you were telling me what – you told me what you didn't tell him.

Can you tell me what you did tell him.

A. Yeah. What I did tell him was that Kathy had made some unwanted sexual advances that had been denied, and that, you know, that the other evening, they spilled over to where they, you know, now other people besides me and, you know, from the initial stuff with Kathy – with the dinner at – with Jincey and Tim and the Easter Sunday deal, that it had spilled over to employees that reported directly to me, and it – and it happened in a fashion that was completely out of line and over the top, and I felt like that it's going to be very difficult to recover from this one.

Q. What kind of detail did you give him about Ms. Sparks's conduct or comments to you?

A. Just the broad statement that I just gave you, just that she had made unwanted – unwanted sexual advances [189] that were denied, and that she had – she had lost her temper and lost her cool that night at the game, and her behavior had – was jeopardizing what I felt like the team, and the success of the team.

* * *

[191] And she made a mockery, you know, the – the time that we went to Kingfish, I was really upset about having to go to that, because I had told them on numerous occasions, "I don't want to" –

And they were like, "Well, Mary's going to be [192] there," you know, her mother.

Q. Didn't you invite them – didn't you invite Ms. Sparks and her mother out to dinner?

A. No, I got – I got forced into that because Patty and Mitch couldn't go, and they said, "You're the only one left; you got to take them to dinner."

So that's how that came down; and it was a joke about that, as well.

* * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUGH HARDAGE, PLAINTIFF, VS. CBS BROADCASTING INC., A NEW YORK CORP.; VIACOM TELEVISION STATIONS, INC., A DELAWARE CORPORATION; VIACOM BROADCASTING OF SEATTLE INC., A DELAWARE CORP., AND KATHY SPARKS, AN INDIVIDUAL, DEFENDANTS.	)	NO. CV02-1303C

DEPOSITION OF PAUL FALCONE
WEDNESDAY, FEBRUARY 12, 2003

FILE NO.: 030212SEG

REPORTED BY: SHERY GARGIR, CSR 11313, RPR

* * *

[43] Q What did you and Mr. Hardage discuss?

A I thanked him for driving me. We had five or ten minutes of small talk about the weather and the baseball game and whoever knows and I said, "So, Hugh, what's cooking? What can I help you with?"

And he proceeded to talk to me probably 15 maybe 20 minutes about the situation with Kathy Sparks.

Q What did he tell you about the situation with Kathy Sparks?

A He said that he wanted to talk with me because the situation had become uncomfortable. He said he felt awkward when he was in a room with her.

He said, "I feel like she's developed feelings for me and truthfully, Paul, I don't really feel feeling for her and she's, you know, the general manager of the station and it's just awkward. It's a little uncomfortable because I can kind of sense it whenever I'm in the room with her."

Q Is that all he discussed? Did he say anything else regarding physical overtures?

A No.

Q Okay.

A He said something about – I remember him [44] telling me about a baseball game they had gone to and I think he said, "I was paying a little bit more attention to some other woman and it looks like Kathy just didn't really like that. I could kind of tell from her body language that she didn't like the fact that I was paying attention to someone else and not to her, you know, just an example of how it's becoming uncomfortable."

* * *

The U.S. Equal Employment Opportunity Commission

	NOTICE	**Number**
EEOC		915.002
		Date
		6/18/99

1. *SUBJECT:* Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors

2. *PURPOSE:* This document provides guidance regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity.

3. *EFFECTIVE DATE:* Upon receipt.

4. *EXPIRATION DATE:* As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. *ORIGINATOR:* Title VII/EPA/ADEA Division, Office of Legal Counsel.

6. *INSTRUCTIONS:* File after Section 615 of Volume II of the Compliance Manual.

6/18/99
Date

/s/
Ida L. Castro
Chairwoman

Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors

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Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

I. Introduction

In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer

may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While the *Faragher* and *Ellerth* decisions addressed sexual harassment, the Court's analysis drew upon standards set forth in cases involving harassment on other protected bases. Moreover, the Commission has always taken the position that the same basic standards apply to all types of prohibited harassment.[1] Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment. (*See* section II, below.)

Harassment remains a pervasive problem in American workplaces. The number of harassment charges filed with the EEOC and state fair employment practices agencies has risen significantly in recent years. For example, the number of sexual harassment charges has increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998. The number of racial harassment charges rose from 4,910 to 9,908 charges in the same time period.

While the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations. The Supreme Court, in *Faragher* and *Ellerth*, relied on Commission guidance which has long advised employers to take all necessary steps to prevent harassment.[2] The new affirmative defense gives credit for such preventive efforts by an employer, thereby "implement[ing] clear

statutory policy and complement[ing] the Government's Title VII enforcement efforts."[3]

The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes. Furthermore, the anti-discrimination statutes are not a "general civility code."[4] Thus federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not "extremely serious."[5] Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment."[6] The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment.[7] Existing Commission guidance on the standards for determining whether challenged conduct rises to the level of unlawful harassment remains in effect.

This document supersedes previous Commission guidance on the issue of vicarious liability for harassment by supervisors.[8] The Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect – an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.[9] The standard is the same in the case of non-employees, but the employer's control over such individuals' misconduct is considered.[10]

II. The Vicarious Liability Rule Applies to Unlawful Harassment on All Covered Bases

The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature[11]), religion, national origin, protected activity,[12] age, or disability.[13] Thus, employers should establish anti-harassment policies and complaint procedures covering *all* forms of unlawful harassment.[14]

* * *

V. Harassment by Supervisor That Does Not Result in a Tangible Employment Action

A. Standard of Liability

When harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability or damages, which it must prove by a preponderance of the evidence. The defense consists of two necessary elements:

> (a) the employer exercised reasonable care to prevent and correct promptly any harassment; and
>
> (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

B. Effect of Standard

If an employer can prove that it discharged its duty of reasonable care and that the employee could have avoided all of the harm but unreasonably failed to do so, the

employer will avoid all liability for unlawful harassment.[43] For example, if an employee was subjected to a pattern of disability-based harassment that created an unlawful hostile environment, but the employee unreasonably failed to complain to management before she suffered emotional harm and the employer exercised reasonable care to prevent and promptly correct the harassment, then the employer will avoid all liability.

If an employer cannot prove that it discharged its duty of reasonable care *and* that the employee unreasonably failed to avoid the harm, the employer will be liable. For example, if unlawful harassment by a supervisor occurred and the employer failed to exercise reasonable care to prevent it, the employer will be liable even if the employee unreasonably failed to complain to management or even if the employer took prompt and appropriate corrective action when it gained notice.[44]

In most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability. An effective complaint procedure "encourages employees to report harassing conduct before it becomes severe or pervasive,"[45] and if an employee promptly utilizes that procedure, the employer can usually stop the harassment before actionable harm occurs.[46]

In some circumstances, however, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee. For example, if an employee's supervisor directed frequent, egregious racial epithets at him that caused emotional harm virtually from the outset, and the employee

promptly complained, corrective action by the employer could prevent further harm but might not correct the actionable harm that the employee already had suffered.[47] Alternatively, if an employee complained about harassment before it became severe or pervasive, remedial measures undertaken by the employer might fail to stop the harassment before it reaches an actionable level, even if those measures are reasonably calculated to halt it. In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care *and* that the employee unreasonably failed to avoid the harm. While a notice-based negligence standard would absolve the employer of liability, the standard set forth in *Ellerth* and *Faragher* does not. As the Court explained, vicarious liability sets a "more stringent standard" for the employer than the "minimum standard" of negligence theory.[48]

While this result may seem harsh to a law abiding employer, it is consistent with liability standards under the anti-discrimination statutes which generally make employers responsible for the discriminatory acts of their supervisors.[49] If, for example, a supervisor rejects a candidate for promotion because of national origin-based bias, the employer will be liable regardless of whether the employee complained to higher management and regardless of whether higher management had any knowledge about the supervisor's motivation.[50] Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly. The employer will be shielded from liability for harassment by a supervisor only if it proves that it exercised reasonable care in preventing and correcting the harassment *and* that the employee unreasonably

failed to avoid all of the harm. If both parties exercise reasonable care, the defense will fail.

In some cases, an employer will be unable to avoid liability completely, but may be able to establish the affirmative defense as a means to limit damages.[51] The defense only limits damages where the employee reasonably could have avoided some but not all of the harm from the harassment. In the example above, in which the supervisor used frequent, egregious racial epithets, an unreasonable delay by the employee in complaining could limit damages but not eliminate liability entirely. This is because a reasonably prompt complaint would have reduced, but not eliminated, the actionable harm.[52]

C. First Prong of Affirmative Defense: Employer's Duty to Exercise Reasonable Care

The first prong of the affirmative defense requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. The steps described below are not mandatory requirements – whether or not an employer can prove that it exercised reasonable care depends on the particular factual circumstances and, in some cases, the nature of the employer's workforce. Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms.[53]

There are no "safe harbors" for employers based on the written content of policies and procedures. Even the best

policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively.[54] If, for example, the employer has an adequate policy and complaint procedure and properly responded to an employee's complaint of harassment, but management ignored previous complaints by other employees about the same harasser, then the employer has not exercised reasonable care in preventing the harassment.[55] Similarly, if the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable care. Alternatively, lack of a formal policy and complaint procedure will not defeat the defense if the employer exercised sufficient care through other means.

1. Policy and Complaint Procedure

It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." *Ellerth*, 118 S. Ct. at 2270. While the Court noted that this "is not necessary in every instance as a matter of law,"[56] failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.[57] (See section V(C)(3), below, for discussion of preventive and corrective measures by small businesses.)

An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it

periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

The above elements are explained in the following subsections.

a. Prohibition Against Harassment

An employer's policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (*i.e.*, opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by *anyone* in the workplace – supervisors, co-workers, or non-employees.[58] Management should convey the seriousness of the prohibition. One way to do that is for the mandate to "come from the top," *i.e.*, from upper management.

The policy should encourage employees to report harassment *before* it becomes severe or pervasive. While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. Therefore, to discharge its duty of preventive care, the employer must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law.

b. Protection Against Retaliation

An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.[59]

Management should undertake whatever measures are necessary to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should

scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives.

c. Effective Complaint Process

An employer's harassment complaint procedure should be designed to encourage victims to come forward. To that end, it should clearly explain the process and ensure that there are no unreasonable obstacles to complaints. A complaint procedure should not be rigid, since that could defeat the goal of preventing and correcting harassment. When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing.

The complaint procedure should provide accessible points of contact for the initial complaint.[60] A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser.[61] Moreover, reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials.[62]

It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints of harassment. For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. Allowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by his or her supervisor may feel that

officials within the chain of command will more readily believe the supervisor's version of events.

It also is important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agencies and to explain that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved.[63] While a prompt complaint process should make it feasible for an employee to delay deciding whether to file a charge until the complaint to the employer is resolved, he or she is not required to do so.[64]

d. Confidentiality

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis.[65]

A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to

pursue a complaint, the employer must discharge its duty to prevent and correct harassment.[66] One mechanism to help avoid such conflicts would be for the employer to set up an informational phone line which employees can use to discuss questions or concerns about harassment on an anonymous basis.[67]

e. Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances.[68] If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

i. Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?

- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.

- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

ii. Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often

occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

iii. Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eyewitness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

f. Assurance of Immediate and Appropriate Corrective Action

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.[69]

Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure

that the harassment does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the employer could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate.

To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense.[70] If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate.[71]

Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise).[72] Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.[73]

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

Examples of Measures to Stop the Harassment and Ensure that it Does Not Recur:

- oral[74] or written warning or reprimand;
- transfer or reassignment;
- demotion;
- reduction of wages;
- suspension;
- discharge;
- training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and
- monitoring of harasser to ensure that harassment stops.

Examples of Measures to Correct the Effects of the Harassment:

- restoration of leave taken because of the harassment;
- expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- reinstatement;
- apology by the harasser;
- monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
- correction of any other harm caused by the harassment (*e.g.*, compensation for losses).

2. Other Preventive and Corrective Measures

An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an anti-harassment policy and complaint procedure. As the Supreme Court stated, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." *Faragher*, 118 S. Ct. at 2291.

An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints[75] and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures.[76] For example, if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint.[77]

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint

procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.

An employer should keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program.[78] For example, an employer could include such compliance in formal evaluations.

Reasonable preventive measures include screening applicants for supervisory jobs to see if any have a record of engaging in harassment. If so, it may be necessary for the employer to reject a candidate on that basis or to take additional steps to prevent harassment by that individual.

Finally, it is advisable for an employer to keep records of all complaints of harassment. Without such records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern would be relevant to credibility assessments and disciplinary measures.[79]

* * *

D. Second Prong of Affirmative Defense: Employee's Duty to Exercise Reasonable Care

The second prong of the affirmative defense requires a showing by the employer that the aggrieved employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270.

This element of the defense arises from the general theory "that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Faragher*, 18 S. Ct. at 2292, *quoting Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982). Thus an employer who exercised reasonable care as described in subsection V(C), above, is not liable for unlawful harassment if the aggrieved employee could have avoided all of the actionable harm. If some but not all of the harm could have been avoided, then an award of damages will be mitigated accordingly.[82]

A complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages.

Proof that the employee unreasonably failed to use any complaint procedure provided by the employer will normally satisfy the employer's burden.[83] However, it is important to emphasize that an employee who failed to complain does not carry a burden of proving the reasonableness of that decision. Rather, the burden lies with the employer to prove that the employee's failure to complain was unreasonable.

1. Failure to Complain

A determination as to whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstances and information available to the employee *at that time*.[84] An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. Workplaces need not become battlegrounds where every minor, unwelcome remark based on race, sex, or another protected category triggers a complaint and investigation. An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resort to the complaint process.[85] The employee may directly say to the harasser that s/he wants the misconduct to stop, and then wait to see if that is effective in ending the harassment before complaining to management. If the harassment persists, however, then further delay in complaining might be found unreasonable.

There might be other reasonable explanations for an employee's delay in complaining or entire failure to utilize the employer's complaint process. For example, the employee might have had reason to believe that:[86]

- using the complaint mechanism entailed a risk of retaliation;
- there were obstacles to complaints; and
- the complaint mechanism was not effective.

To establish the second prong of the affirmative defense, the employer must prove that the belief or perception underlying the employee's failure to complain was unreasonable.

a. Risk of Retaliation

An employer cannot establish that an employee unreasonably failed to use its complaint procedure if that employee reasonably feared retaliation. Surveys have shown that employees who are subjected to harassment frequently do not complain to management due to fear of retaliation.[87] To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment.

b. Obstacles to Complaints

An employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on unnecessary obstacles to complaints. For example, if the process entailed undue expense by the employee,[88] inaccessible points of contact for making complaints,[89] or unnecessarily intimidating or burdensome requirements, failure to invoke it on such a basis would be reasonable.

An employee's failure to participate in a mandatory mediation or other alternative dispute resolution process also does not constitute unreasonable failure to avoid harm. While an employee can be expected to cooperate in the employer's investigation by providing relevant information, an employee can never be required to waive rights, either substantive or procedural, as an element of his or her exercise of reasonable care.[90] Nor must an employee have to try to resolve the matter with the harasser as an element of exercising due care.

c. Perception That Complaint Process Was Ineffective

An employer cannot establish the second prong of the defense based on the employee's failure to complain if that failure was based on a reasonable belief that the process was ineffective. For example, an employee would have a reasonable basis to believe that the complaint process is ineffective if the procedure required the employee to complain initially to the harassing supervisor. Such a reasonable basis also would be found if he or she was aware of instances in which co-workers' complaints failed to stop harassment. One way to increase employees' confidence in the efficacy of the complaint process would be for the employer to release general information to employees about corrective and disciplinary measures undertaken to stop harassment.[91]

2. Other Efforts to Avoid Harm

Generally, an employer can prove the second prong of the affirmative defense if the employee unreasonably failed to utilize its complaint process. However, such proof will not establish the defense if the employee made other efforts to avoid harm.

For example, a prompt complaint by the employee to the EEOC or a state fair employment practices agency while the harassment is ongoing could qualify as such an effort. A union grievance could also qualify as an effort to avoid harm.[92] Similarly, a staffing firm worker who is harassed at the client's workplace might report the harassment either to the staffing firm or to the client, reasonably expecting that either would act to correct the problem.[93] Thus the worker's failure to complain to one of those

entities would not bar him or her from subsequently bringing a claim against it.

With these and any other efforts to avoid harm, the timing of the complaint could affect liability or damages. If the employee could have avoided some of the harm by complaining earlier, then damages would be mitigated accordingly.

* * *

VII. Conclusion

The Supreme Court's rulings in *Ellerth* and *Faragher* create an incentive for employers to implement and enforce strong policies prohibiting harassment and effective complaint procedures. The rulings also create an incentive for employees to alert management about harassment before it becomes severe and pervasive. If employers and employees undertake these steps, unlawful harassment can often be prevented, thereby effectuating an important goal of the anti-discrimination statutes.

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[1] *See, e.g.*, 29 C.F.R. § 1604.11 n. 1 ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compliance Manual Section 615.11(a) (BNA 615:0025 ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees").

[2] *See* 1980 Guidelines at 29 C.F.R. § 1604.11(f) and Policy Guidance on Current Issues of Sexual Harassment, Section E, 8 FEP Manual 405:6699 (Mar. 19, 1990), quoted in *Faragher*, 118 S. Ct. at 2292.

[3] *Faragher*, 118 S. Ct. at 2292.

[4] *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998).

[5] *Faragher*, 118 S.Ct. at 2283. However, when isolated incidents that are not "extremely serious" come to the attention of management, appropriate corrective action should still be taken so that they do not escalate. *See* Section V(C)(1)(a), below.

[6] *Oncale*, 118 S. Ct. at 1003.

[7] Some previous Commission documents classified harassment as either "quid pro quo" or hostile environment. However, it is now more useful to distinguish between harassment that results in a tangible employment action and harassment that creates a hostile work environment, since that dichotomy determines whether the employer can raise the affirmative defense to vicarious liability. Guidance on the definition of "tangible employment action" appears in section IV(B), below.

[8] The guidance in this document applies to federal sector employers, as well as all other employers covered by the statutes enforced by the Commission.

[9] 29 C.F.R. § 1604.11(d).

[10] The Commission will rescind Subsection 1604.11(c) of the 1980 Guidelines on Sexual Harassment, 29 CFR § 1604.11(c). In addition, the following Commission guidance is no longer in effect: Subsection D of the 1990 Policy Statement on Current Issues in Sexual Harassment ("Employer Liability for Harassment by Supervisors"), EEOC Compliance Manual (BNA) N:4050-58 (3/19/90); and EEOC Compliance Manual Section 615.3(c) (BNA) 6:15-0007-0008.

The remaining portions of the 1980 Guidelines, the 1990 Policy Statement, and Section 615 of the Compliance Manual remain in effect. Other Commission guidance on harassment also remains in effect, including the Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, EEOC Compliance Manual (BNA) N:4071 (3/8/94) and the Policy Guidance on Employer Liability for Sexual Favoritism, EEOC Compliance Manual (BNA) N:5051 (3/19/90).

[11] Harassment that is targeted at an individual because of his or her sex violates Title VII even if it does not involve sexual comments or conduct. Thus, for example, frequent, derogatory remarks about women could constitute unlawful harassment even if the remarks are not sexual in nature. *See* 1990 Policy Guidance on Current Issues of Sexual Harassment, subsection C(4) ("sex-based harassment – that is, harassment not involving sexual activity or language – may also give rise to Title VII liability . . . if it is 'sufficiently patterned or pervasive' and directed at employees because of their sex").

[12] "Protected activity" means opposition to discrimination or participation in proceedings covered by the anti-discrimination statutes. Harassment based on protected activity can constitute unlawful retaliation. *See* EEOC Compliance Manual Section 8 ("Retaliation") (BNA) 614:001 (May 20, 1998).

[13] For cases applying *Ellerth* and *Faragher* to harassment on different bases, *see Hafford v. Seidner*, 167 F.3d 1074, 1080 (6th Cir. 1999) (religion and race); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) (age); *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 411 (6th Cir. 1999) (race); *Richmond-Hopes*

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v. City of Cleveland, No. 97-3595, 1998 WL 808222 at *9 (6th Cir. Nov. 16, 1998) (unpublished) (retaliation); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race); *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925 at *5 (N.D. Ill. Jan. 7, 1999) (national origin). *See also Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998) (assuming without deciding that ADA hostile environment claims are modeled after Title VII claims), *cert. denied*, 119 S. Ct. 1141 (1999).

[14] The majority's analysis in both *Faragher* and *Ellerth* drew upon the liability standards for harassment on other protected bases. It is therefore clear that the same standards apply. *See Faragher*, 118 S. Ct. at 2283 (in determining appropriate standard of liability for sexual harassment by supervisors, Court "drew upon cases recognizing liability for discriminatory harassment based on race and national origin"); *Ellerth*, 118 S. Ct. at 2268 (Court imported concept of "tangible employment action" in race, age and national origin discrimination cases for resolution of vicarious liability in sexual harassment cases). *See also* cases cited in n.13, above.

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[43] *See Faragher*, 118 S. Ct. at 2292 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care.").

[44] *See, e.g., EEOC v. SBS Transit, Inc.*, No. 97-4164, 1998 WL 903833 at *1 (6th Cir. Dec. 18, 1998) (unpublished) (lower court erred when it reasoned that employer liability for sexual harassment is negated if the employer responds adequately and effectively once it has notice of

the supervisor's harassment; that standard conflicts with affirmative defense which requires proof that employer "took reasonable care to *prevent* and correct promptly any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer").

[45] *Ellerth*, 118 S. Ct. at 2270.

[46] *See Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 803 (5th Cir. 1999) ("when an employer satisfies the first element of the Supreme Court's affirmative defense, it will likely forestall its own vicarious liability for a supervisor's discriminatory conduct by nipping such behavior in the bud") (Wiener, J., concurring in *Indest*, 164 F.3d 258 (5th Cir. 1999)). The Commission agrees with Judge Wiener's concurrence in *Indest* that the court in that case dismissed the plaintiff's claims on an erroneous basis. The plaintiff alleged that her supervisor made five crude sexual comments or gestures to her during a week-long convention. She reported the incidents to appropriate management officials who investigated the matter and meted out appropriate discipline. No further incidents of harassment occurred. The court noted that it was "difficult to conclude" that the conduct to which the plaintiff was briefly subjected created an unlawful hostile environment. Nevertheless, the court went on to consider liability. It stated that *Ellerth* and *Faragher* do not apply where the plaintiff quickly resorted to the employer's grievance procedure and the employer took prompt remedial action. In such a case, according to the court, the employer's quick response exempts it from liability. The Commission agrees with Judge Wiener that *Ellerth* and *Faragher* do control the analysis in such cases, and that an employee's prompt

complaint to management forecloses the employer from proving the affirmative defense. However, as Judge Wiener pointed out, an employer's quick remedial action will often thwart the creation of an unlawful hostile environment, rendering any consideration of employer liability unnecessary.

[47] *See Greene v. Dalton*, 164 F.3d 671, 674 (D.C. Cir. 1999) (in order for defendant to avoid all liability for sexual harassment leading to rape of plaintiff "it must show not merely that [the plaintiff] inexcusably delayed reporting the alleged rape . . . but that, as a matter of law, a reasonable person in [her] place would have come forward early enough to prevent [the] harassment from becoming 'severe or pervasive' ").

[48] *Ellerth*, 118 S. Ct. at 2267.

[49] Under this same principle, it is the Commission's position that an employer is liable for punitive damages if its supervisor commits unlawful harassment or other discriminatory conduct with malice or with reckless indifference to the employee's federally protected rights. (The Supreme Court will determine the standard for awarding punitive damages in *Kolstad v. American Dental Association*, 119 S. Ct. 401 (1998) (granting certiorari).) The test for imposition of punitive damages is the mental state of the harasser, not of higher-level officials. This approach furthers the remedial and deterrent objectives of the anti-discrimination statutes, and is consistent with the vicarious liability standard set forth in *Faragher* and *Ellerth*.

[50] Even if higher management proves that evidence it discovered after-the-fact would have justified the supervisor's action, such evidence can only limit remedies, not

eliminate liability. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-62 (1995).

[51] *See Faragher*, 118 S. Ct. at 2293, and *Ellerth*, 118 S. Ct. at 2270 (affirmative defense operates either to eliminate liability or limit damages).

[52] *See Faragher*, 118 S. Ct. at 2292 ("if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided").

[53] *See* Section V(C)(3) for a discussion of preventive and corrective care by small employers.

[54] *See Hurley v. Atlantic City Police Dept.*, No. 96-5634, 96-5633, 96-5661, 96-5738, 1999 WL 150301 (3d Cir. March 18, 1999) ("*Ellerth* and *Faragher* do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort"; defendant failed to prove affirmative defense where it issued written policies without enforcing them, painted over offensive graffiti every few months only to see it go up again in minutes, and failed to investigate sexual harassment as it investigated and punished other forms of misconduct.).

[55] *See Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 422 (11th Cir. 1999) (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action).

[56] *Ellerth*, 118 S. Ct. at 2270.

[57] A union grievance and arbitration system does not fulfill this obligation. Decision making under such a system addresses the collective interests of bargaining unit members, while decision making under an internal harassment complaint process should focus on the individual complainant's rights under the employer's anti-harassment policy.

An arbitration, mediation, or other alternative dispute resolution process also does not fulfill the employer's duty of due care. The employer cannot discharge its responsibility to investigate complaints of harassment and undertake corrective measures by providing employees with a dispute resolution process. For further discussion of the impact of such procedures on the affirmative defense, see Section V(D)(1)(b), below.

Finally, a federal agency's formal, internal EEO complaint process does not, by itself, fulfill its obligation to exercise reasonable care. That process only addresses complaints of violations of the federal EEO laws, while the Court, in *Ellerth*, made clear that an employer should encourage employees "to report harassing conduct before it becomes severe or pervasive." *Ellerth*, 118 S. Ct. at 2270. Furthermore, the EEO process is designed to assess whether the agency is liable for unlawful discrimination and does not necessarily fulfill the agency's obligation to undertake immediate and appropriate corrective action.

[58] Although the affirmative defense does not apply in cases of harassment by co-workers or non-employees, an employer cannot claim lack of knowledge as a defense to such harassment if it did not make clear to employees that

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they can bring such misconduct to the attention of management and that such complaints will be addressed. *See Perry v. Ethan Allen*, 115 F.3d 143, 149 (2d Cir. 1997) ("When harassment is perpetrated by the plaintiff's coworkers, an employer will be liable if the plaintiff demonstrates that 'the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it'"), cited in *Faragher*, 118 S. Ct. at 2289. Furthermore, an employer is liable for harassment by a co-worker or non-employer if management knew or should have known of the misconduct, unless the employer can show that it took immediate and appropriate corrective action. 29 C.F.R. § 1604.11(d). Therefore, the employer should have a mechanism for investigating such allegations and undertaking corrective action, where appropriate.

[59] Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation. *See, e.g.,* Louise F. Fitzgerald & Suzanne Swan, "Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment," 51 *Journal of Social Issues* 117, 121-22 (1995) (citing studies). Surveys also have shown that a significant proportion of harassment victims are worse off after complaining. *Id.* at 123-24; *see also* Patricia A. Frazier, "Overview of Sexual Harassment From the Behavioral Science Perspective," paper presented at the American Bar Association National Institute on Sexual Harassment at B-17 (1998) (reviewing studies that show frequency of retaliation after victims confront their harasser or filed formal complaints).

[60] *See Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998) (complaint process deficient where it permitted employees to bypass the harassing supervisor by complaining to director of personnel services, but the director was inaccessible due to hours of duty and location in separate facility).

[61] *Faragher*, 118 S. Ct. at 2293 (in holding as matter of law that City did not exercise reasonable care to prevent the supervisors' harassment, Court took note of fact that City's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints"); *Meritor Savings Bank, FSB v. Vinson*, 471 U.S. 57, 72 (1986).

[62] *See Wilson*, 164 F.3d at 541 (complaint procedure deficient because it only required supervisors to report "formal" as opposed to "informal" complaints of harassment); *Varner v. National Super Markets Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 519 U.S. 1110 (1997) (complaint procedure is not effective if it does not require supervisor with knowledge of harassment to report the information to those in position to take appropriate action).

[63] It is particularly important for federal agencies to explain the statute of limitations for filing formal EEO complaints, because the regulatory deadline is only 45 days and employees may otherwise assume they can wait whatever length of time it takes for management to complete its internal investigation.

[64] If an employer actively misleads an employee into missing the deadline for filing a charge by dragging out its investigation and assuring the employee that the harassment will be rectified, then the employer would be "equitably

estopped" from challenging the delay. *See Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) ("an employer's affirmatively misleading statements that a grievance will be resolved in the employee's favor can establish an equitable estoppel"); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992) (tolling is appropriate where plaintiff was led by defendant to believe that the discriminatory treatment would be rectified); *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 845 (3d Cir. 1992) (equitable tolling applies where employer's own acts or omission has lulled the plaintiff into foregoing prompt attempt to vindicate his rights).

[65] The sharing of records about a harassment complaint with prospective employers of the complainant could constitute unlawful retaliation. *See* Compliance Manual Section 8 ("Retaliation), subsection II D (2), (BNA) 614:0005 (5/20/98).

[66] One court has suggested that it may be permissible to honor such a request, but that when the harassment is severe, an employer cannot just stand by, even if requested to do so. *Torres v. Pisano*, 116 F.3d 625 (2d Cir.), *cert. denied*, 118 S. Ct. 563 (1997).

[67] Employers may hesitate to set up such a phone line due to concern that it may create a duty to investigate anonymous complaints, even if based on mere rumor. To avoid any confusion as to whether an anonymous complaint through such a phone line triggers an investigation, the employer should make clear that the person who takes the calls is not a management official and can only answer questions and provide information. An investigation will

proceed only if a complaint is made through the internal complaint process or if management otherwise learns about alleged harassment.

[68] *See, e.g., Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996) (employer's response prompt where it began investigation on the day that complaint was made, conducted interviews within two days, and fired the harasser within ten days); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer's response to complaints inadequate despite eventual discharge of harasser where it did not seriously investigate or strongly reprimand supervisor until after plaintiff filed charge with state FEP agency), *cert. denied*, 513 U.S. 1082 (1995); *Saxton v. AT&T*, 10 F.3d 526, 535 (7th Cir 1993) (investigation prompt where it was begun one day after complaint and a detailed report was completed two weeks later); *Nash v. Electrospace Systems, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) (prompt investigation completed within one week); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 319 (7th Cir. 1992) (adequate investigation completed within four days).

[69] Management may be reluctant to release information about specific disciplinary measures that it undertakes against the harasser, due to concerns about potential defamation claims by the harasser. However, many courts have recognized that limited disclosures of such information are privileged. For cases addressing defenses to defamation claims arising out of alleged harassment, *see Duffy v. Leading Edge Products*, 44 F.3d 308, 311 (5th Cir. 1995) (qualified privilege applied to statements accusing plaintiff of harassment); *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (qualified

privilege protects employer's statements in bulletin to employees concerning dismissal of alleged harasser); *Stockley v. AT&T*, 687 F. Supp. 764 (F. Supp. 764 (E.D.N.Y. 1988) (statements made in course of investigation into sexual harassment charges protected by qualified privilege).

[70] *Mockler v Multnomah County*, 140 F.3d 808, 813 (9th Cir. 1998).

[71] In some cases, accused harassers who were subjected to discipline and subsequently exonerated have claimed that the disciplinary action was discriminatory. No discrimination will be found if the employer had a good faith belief that such action was warranted and there is no evidence that it undertook less punitive measures against similarly situated employees outside his or her protected class who were accused of harassment. In such circumstances, the Commission will not find pretext based solely on an after-the-fact conclusion that the disciplinary action was inappropriate. *See Waggoner v. City of Garland Tex.*, 987 F.2d 1160, 1165 (5th Cir. 1993) (where accused harasser claims that disciplinary action was discriminatory, "[t]he real issue is whether the employer reasonably believed the employee's allegation [of harassment] and acted on it in good faith, or to the contrary, the employer did not actually believe the co-employee's allegation but instead used it as a pretext for an otherwise discriminatory dismissal").

[72] *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer remedial action for sexual harassment by supervisor inadequate where it twice changed plaintiff's shift to get her away from

supervisor rather than change his shift or work area), *cert. denied*, 513 U.S. 1082 (1995).

[73] *See Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) ("a remedial measure that makes the victim of sexual harassment worse off is ineffective *per se*").

[74] An oral warning or reprimand would be appropriate only if the misconduct was isolated and minor. If an employer relies on oral warnings or reprimands to correct harassment, it will have difficulty proving that it exercised reasonable care to prevent and correct such misconduct.

[75] *See Varner*, 94 F.3d at 1213 (complaint procedure is not effective if it does not require supervisor with knowledge of harassment to report the information to those in position to take appropriate action), *cert. denied*, 117 S. Ct. 946 (1997); *accord Wilson v. Tulsa Junior College*, 164 F.3d at 541.

[76] *See Wilson*, 164 F.3d at 541 (complaint procedure deficient because it only required supervisors to report "formal" as opposed to "informal" complaints of harassment).

[77] *See, e.g., Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996) (where harassment of plaintiffs was so pervasive that higher management could be deemed to have constructive knowledge of it, employer was obligated to undertake corrective action even though plaintiffs did not register complaints); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp.2d 870, 882 (N.D. Ind. 1998) (employer has constructive knowledge of harassment by supervisors where it "was so broad in scope and so permeated the workplace that it

must have come to the attention of someone authorized to do something about it").

[78] In *Faragher*, the City lost the opportunity to establish the affirmative defense in part because "its officials made no attempt to keep track of the conduct of supervisors." *Faragher*, 118 S. Ct. at 2293.

[79] See subsections V(C)(1)(e)(ii) and V(C)(2), above.

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[82] *Faragher*, 118 S. Ct. at 2292 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.").

[83] *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293. *See also Scrivner v. Socorro Independent School District*, 169 F.3d 969, 971 (5th Cir., 1999) (employer established second prong of defense where harassment began during summer, plaintiff misled investigators inquiring into anonymous complaint by denying that harassment occurred, and plaintiff did not complain about the harassment until the following March).

[84] The employee is not required to have chosen "the course that events later show to have been the best." Restatement (Second) of Torts § 918, comment c.

[85] *See Corcoran v. Shoney's Colonial, Inc.*, 24 F. Supp.2d 601, 606 (W.D. Va. 1998) ("Though unwanted sexual remarks have no place in the work environment, it

is far from uncommon for those subjected to such remarks to ignore them when they are first made.").

[86] *See Faragher*, 118 S. Ct. at 2292 (defense established if plaintiff unreasonably failed to avail herself of "a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense"). *See also* Restatement (Second) of Torts § 918, comment c (tort victim "is not barred from full recovery by the fact that it would have been reasonable for him to make expenditures or subject himself to pain or risk; it is only when he is unreasonable in refusing or failing to take action to prevent further loss that his damages are curtailed").

[87] *See* n.59, above.

[88] *See Faragher*, 118 S. Ct. at 2292 (employee should not recover for harm that could have been avoided by utilizing a proven, effective complaint process that was available "without undue risk or expense").

[89] *See Wilson*, 164 F.3d at 541 (complaint process deficient where official who could take complaint was inaccessible due to hours of duty and location in separate facility).

[90] *See* Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Compliance Manual (BNA) N:3101 (7/10/97).

[91] For a discussion of defamation claims and the application of a qualified privilege to an employer's statements about instances of harassment, *see* n.69, above.

[92] *See Watts v. Kroger Company*, 170 F.3d 505, 510 (5th Cir., 1999) (plaintiff made effort "to avoid harm otherwise" where she filed a union grievance and did not utilize the employer's harassment complaint process; both the employer and union procedures were corrective mechanisms designed to avoid harm).

[93] Both the staffing firm and the client may be legally responsible, under the anti-discrimination statutes, for undertaking corrective action. *See* Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Compliance Manual (BNA) N:3317 (12/3/97).

* * *

University of Washington

Construction Labor Law

Win 2006 • CEE 593 A • SLN 2369
M 6:00-8:50 pm • MGH 231

Prof. Steve Goldblatt, JD
ARC 116 • 206.685.1676
bio • courses • email

"In 2005, public-sector workers had a union membership rate more than four times that of private-sector employees, 36.5% compared with 7.8%. The rate for private industry workers has fallen from 20.1% since 1983. Construction had a 13.1% rate." Union members in 2005 (20 Jan 06)

Course syllabus

Course description A seminar on construction labor and employment topics, including labor-management organization, legislation, and regulation, collective bargaining, and jobsite administration.

Purpose Every firm in the construction industry, whether unionized or not, deals with employees on a daily basis. They must conduct their business according to numerous rules established over the last 70 years. The purpose of this course is to discuss with you in depth the law and policy of construction labor relations.

Major objectives As a result of satisfactorily completing this course, you will be able to understand the organization of American labor-management relations; recognize key pieces of labor and employment legislation and regulation and identify the primary purpose, issues, and impact

of each; analyze labor contract terms, especially those dealing with wages, hours, and fringe benefits; recognize and distinguish certain procedures used in the processes of collective bargaining; and compare and contrast labor relations in union and open shop construction.

Text A ten-week $5 student-rate subscription to BNA's **Construction Labor Report** is *required.* Smith's **Construction Labor Relations** (CCH 1984, with its 1993 paper supplement), CCH's **1989 Guidebook to Labor Relations** ("GLR"), and CCH's **1996 Guidebook to Fair Employment Practices** ("FEP") are on reserve in the CAUP library.

Reading Each week *prior to class* you should look over the class outlines and their linked materials. You may also do the reserve reading as listed in the schedule.

Class format Lecture/discussion led by the instructor and, as invited, any guests. Your opportunity to participate depends necessarily on class size and the material to be covered.

Submittals A research paper, its abstract, and a contribution to your team's bargaining game report are required as listed in the schedule.

Evaluation You'll earn scores on your paper (50%), your team's bargaining game report (25%), and your class participation and leadership (25%). Grades will be based on your total scores.

Class 6 outlines

Equal employment opportunity

- The process of discrimination
  - Individual < organizational < structural
- Civil rights laws
  - Acknowledge and combat discrimination
  - Administered by Equal Employment Opportunity Commission (EEOC)
    - Discrimination charge filings up 4.5% in FY02 (6 Feb 03)
  - Monitored by Commission on Civil Rights
  - Enforced by DOJ's Civil Rights Division
  - WA: Human Rights Commission: RCW 49.60 (L 49)
- Title VII of the Civil Rights Act of 1964 as amended: 42 USC § 2000e et seq.
  - Prohibited discrimination
    - Race/color
      - EEOC sues major construction firm for widespread race discrimination (11 Jun 01)
    - National origin: tension with immigration laws [see week 1]
      - EEOC enforcement guidance (27 June 02)
      - EEOC on workplace rights after 9/11 (16 July 02)

- Religion
- Pregnancy: **UAW v. Johnson Controls**, 499 U.S. 187 (1991)
    - Breastfeeding? S 418 (2003)
- Sexual harassment: SQ 1
    - **Meritor Savings v. Vinson**, 477 U.S. 57 (1986)
    - **Harris v. Forklift Systems**, 510 U.S. 17 (1993)
        - EEOC enforcement guidance (8 Mar 94)
    - **Oncale v. Sundowner Offshore**, 523 U.S. 75 (1998)
        - EEOC settles first all-male class action (11 Aug 99)
    - **Burlington Industries v. Ellerth**, 524 U.S. 742 (1998)
    - **Faragher v. Boca Raton**, 524 U.S. 775 (1998)
    - **Nichols v. Azteca** (9th Cir. 2001)
    - **Little v. Windermere** (9th Cir. 2001)
    - **PA State Police v. Suders**, 542 U.S. 129 (2004)
    - **EEOC v. NEA**, 422 F.3d 840 (9th Cir. 2005)
    - **Hardage v. CBS [KSTW]** (9th Cir. 2006)

[LOGO] **CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION** 6th Edition ©2003

by Professors Michael J. Zimmer, Charles A. Sullivan & Rebecca Hanner White

Current Updates

Chapters 1-10 March 2006 Update

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Page 532. Add after first sentence in Note 6:

May an employer escape responsibility if the employee who complains also asks it to take no action? See Hardage v. CBS Broad. Inc., 433 F.3d 672 (9th Cir. 2006) (plaintiff's statement to employer that he preferred to handle the matter himself meant that the defendant's failure to investigate was not unreasonable even though its policy required investigation).

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Employment Law

9TH CIR. 'HARDAGE' RULING

Jay W. Waks and William Poorten

My supervisor sexually harassed me, but please don't do anything about it. ' Employees victimized by a supervisor may imperil their claims either by not giving sufficient details of the harassment or by telling the employer they would prefer to work out the matter themselves, as illustrated by the 9th U.S. Circuit Court of Appeals' recent decision in Hardage v. CBS Broadcasting Inc., 427 F.3d 1177 (9th Cir. 2005). Although the result of Hardage appears to be employer-friendly, the issue is not quite so clear-cut, and the specific obligations of an employer to the immediate victim, to its other employees and to the alleged harasser remain cloudy when the employee asks the employer not to take action.

In Hardage, the plaintiff, a male sales manager for a local television station, claimed that the station's female general manager sexually harassed him. The plaintiff told the human resources representative that the general manager had made unwanted sexual advances. Although human resources offered to treat his complaint as having an anonymous source, he refused to elaborate and omitted details regarding the alleged physical contact and groping. Twice within a two-week period, the plaintiff rebuffed human resources' intervention, saying he preferred to

handle the matter himself and was skeptical that the complaint could be kept anonymous.

His employer came to regret not having followed up on these allegations when the plaintiff quit, alleging constructive discharge caused by, among other things, the general manager's harassment. In affirming the district court's summary judgment for the employer, the 9th Circuit held that the plaintiff's insistence on handling it himself and failure to provide details of his allegations precluded the employer's vicarious liability under the U.S. Supreme Court's 1998 Ellerth/Faragher tests. Under Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 765 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998), an affirmative defense against vicarious liability for a supervisor's harassment that had not resulted in a 'tangible employment action' (e.g., termination, demotion, failure to promote) is available so long as the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. For example, in a recent decision, the employee's failure to pursue her harassment claim beyond her immediate supervisor contravened the company handbook and led to the dismissal of her claim. Harvill v. Westward Communications LLC, 2005 WL 3388571 (5th Cir. Dec. 13, 2005).

'Hardage' outcome seems reasonable, but poses issues

On its face, the Hardage outcome may seem perfectly reasonable. If an alleging employee does not supply sufficient details to put the employer on notice of what needs to be investigated and corrected, the employee has

certainly failed to avail herself/himself of a preventive or corrective opportunity. See EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002, § V.D. (June 18, 1999); see also O'Dell v. Trans World Entertainment, 153 F. Supp. 2d 378, 389 (S.D.N.Y. 2001); Breda v. Wolf Camera & Video, 222 F.3d 886, 890 (11th Cir. 2000); but see Hardage, 427 F.3d at 1193 (dissent).

Moreover, if the victim asks that nothing be done, it may be fair to assume that the employee is capable of weighing the gravity of the conduct and the best response to it. See, e.g., Hooker v. Wentz, 77 F. Supp. 2d 753, 757-58 (S.D. W.Va. 1999) .

The Hardage court is not alone. Others have found that if employees effectively call for nothing more than a muted, or even passive, response from the employer, the employer should not be later blamed for avoiding an often time-consuming and disruptive investigation by heeding that wish. See Hooker, 77 F. Supp. 2d at 757-58; Torres v. Pisano, 116 F.3d 625, 639 (2d Cir. 1997); Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999).

In practice, however, is reliance on Hardage the most prudent course for employers confronted by a reluctant victim? Prior to Hardage, other courts (and the Equal Employment Opportunity Commission) had been concerned that heeding employee requests for confidentiality and inaction would be inconsistent with the affirmative defense. See, e.g., Malik v. Carrier Corp., 202 F.3d 97, 106 (2d Cir. 2000). The EEOC expects employers to act to resolve harassment despite the complaining employee's insistence on confidentiality and inaction. See EEOC Enforcement Guidance, supra, at § V.C.1.d.

A reticent employee's desire for confidentiality or inaction may mask serious misconduct for which the employer later can be held accountable. O'Dell, 153 F. Supp. 2d at 390; Dinkins v. Charoen Pokphand USA Inc., 133 F. Supp. 2d 1237 (M.D. Ala. 2001); Wixted v. DHL Airways Inc., 1998 WL 164922 (N.D. Ill. April 7, 1998).

An employer that, having been apprised of allegations of supervisor harassment, drops the matter at the employee accuser's request runs the risk that the supervisor is nevertheless harassing others or continuing to harass and intimidate the victim, thereby damaging workplace harmony and productivity (aside from violating Title VII). In a pre-Ellerth/Faragher case ultimately finding no employer liability for heeding an employee request for inaction, the 2d Circuit nevertheless observed, 'There may be cases in which a supervisor or co-worker is harassing a number of employees, and one harassed employee asks the company not to take action. In those cases, the employer's duty to the other employees would take precedence, and the company would most likely not be justified in honoring a single employee's request not to act.' Torres, 116 F.3d at 639.

Aside from the danger of 'false negatives' (impeding recovery for legitimate victims of harassment merely because of fear of backlash from the harasser) that may flow from Hardage, there also is the threat that Hardage 's rationale would encourage baseless workplace complaints. Thus, an employee could present nonmeritorious accusations against a supervisor, and then insist on not wanting to do anything about them. The employer could take advantage of the affirmative defense as per Hardage simply by following the employee's directive and doing nothing. But such 'false positives' may then go uninvestigated, since

there would be less incentive to follow up if the alleging employee specifically requests otherwise, with the consequence that the accused supervisor remains blemished by insinuations of harassment that are neither verified nor refuted, much less brought to his or her attention. Moreover, even if employees report a harasser's problematic behavior to management but do not themselves consider the conduct to be sexual harassment or want the employer to proceed, there is still the possibility that the employer may be charged with notice for purposes of a future claim involving that same harasser. See Dees v. Johnson Controls World Servs. Inc., 168 F.3d 417, 422-23 (11th Cir. 1999); Brunson v. Bayer Corp., 237 F. Supp. 2d 192, 204 (D. Conn. 2002); Wixted, 1998 WL 164922, at 11.

By contrast, if employees have reason to expect that the company will fully investigate (and correct) any harassing conduct, the possibility of baseless accusations would be minimized. McDaniel v. American Red Cross, Johnstown Region, 58 F. Supp. 2d 628, 632 (W.D. Pa. 1999). Moreover, because the employer normally would be liable only if the underlying conduct is sufficiently 'severe or pervasive' (see Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 81 (1998)), minor complaints – what one court described as 'the garden-variety social friction and fiction of the workplace' – need not necessarily be investigated. McDaniel, 58 F. Supp. 2d at 632. Aside from trivial matters, employers should want to know for themselves whether harassing conduct is interfering with their workplaces or putting them at risk.

Pursuit of harassment-free workplace must be priority

As a practical matter, employers and employees alike could well benefit from a clearer rule as to the obligation of

employers to investigate and correct incidences of harassment that are reported, regardless of the expressed preference of the victimized employee. In the final analysis, employee confidentiality should not trump the pursuit of a harassment-free workplace. Otherwise, an employer could theoretically circumvent the Ellerth/Faragher requirement to prevent and correct workplace harassment simply by offering an alleging employee the option to keep the matter confidential (and, implicity, do nothing about it), which some employees may elect if only out of sheer embarrassment. See, e.g, Hardage, 427 F.3d at 1192 (Paez, J., dissenting in part) (noting that the employer representative to whom the alleging employee initially reported the harassment allegations suggested 'do[ing] absolutely nothing and hop[ing] it solves itself' as one option for how to proceed).

The better rule, and the more prudent workplace practice, is for employers to investigate all allegations of sexual harassment and take appropriate remedial action. It is, after all, the employer's workplace that is threatened and damaged by an atmosphere of sexual misconduct, and the employer is in the best position to address any problems and respond to them fully before, and, it is hoped, in lieu of, litigation.

Jay W. Waks, a litigation partner at Kaye Scholer in New York, is chairman of the firm's employment and labor law practice, representing corporations in the United States and abroad. William Poorten is a litigation associate at the firm.